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Supreme Court of the United States

October Term, 1997

DISTRICT ATTORNEY OF BUCKS COUNTY; MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent, of the State Correctional Institution at Greene; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview,

Petitioners,

vs.

CLIFFORD SMITH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a federal habeas court grant relief from a state criminal conviction to a defendant who claims that the jury instructions provided at his state criminal trial improperly defined state law?

Is a perceived ambiguity in a state trial court's instruction on accomplice liability, which arguably relieved the Commonwealth of its burden to prove that the accomplice shared with the principal a specific intent to kill, nonetheless harmless where all the trial evidence showed that the respondent was the principal rather than an accomplice, where none of the trial evidence at trial showed that the co-defendant was the principal, and where the jury's verdict demonstrated that it had concluded that the respondent had indeed fired the fatal shot?

PARTIES TO THE PROCEEDING

The petitioners are:

The District Attorney of Bucks County;

Martin Horn, Commissioner, Pennsylvania Department o Corrections;

James Price, Superintendent, of the State Correctiona Institution at Greene;

Joseph P. Mazurkiewicz, Superintendent of the Stat Correctional Institution at Rockview.

The respondent is:

Clifford Smith

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
I. Errors Of State Law Cannot Be Repackaged As Issues Of Constitutional Dimension Simply By Citing The Due Process Clause. In Concluding That The State Trial Court Misdefined Accomplice Liability Under State Law And Thus Relieved The Commonwealth Of Its Burden To Prove All Of The Elements Of First Degree Murder Beyond A Reasonable Doubt, The Third Circuit Effectively Federalized And Made Available For Federal Habeas Review All Asserted Errors Of State Law In Jury Instructions, In Contravention Of This Court's Well-Established Precedent.	4

Contents

Page

II. Any Error In The Trial Court's Instructions On Accomplice Liability And First Degree Murder Was Harmless. 10

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Brecht v. Abrahamson, 507 U.S. 619 (1993) 12

Carella v. California, 491 U.S. 263 (1989) 9

Commonwealth v. Bachert, 453 A.2d 931 (Pa. 1982) .. 5

Commonwealth v. Huffman, 638 A.2d 961 (Pa. 1994) . 5

Engle v. Isaac, 456 U.S. 107 (1981) 4

Estelle v. McGuire, 502 U.S. 62 (1991) 4, 10

Francis v. Franklin, 471 U.S. 307 (1985) 9

Lewis v. Jeffers, 497 U.S. 764 (1990) 4

Sandstrom v. Montana, 442 U.S. 510 (1979) 9

Smith v. Horn, 120 F.3d 400 (1997) 6, 9, 10

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

18 Pa. C.S. § 306 7

18 Pa. C.S. § 306(c) 8

18 Pa. C.S. § 306(d) 8

United States Constitution Cited:

Fourteenth Amendment 1

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed July 24, 1997 . 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Dated February 22, 1996 ..... 59a

Appendix C — Denial Of Petition For Rehearing Of The United States Court Of Appeals For The Third Circuit Filed August 22, 1997 ..... 92a

OPINIONS BELOW

The July 24, 1997 judgement and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the District Court, is reported at 120 F.3d 400 (3d Cir. 1997), and is reprinted in the Appendix at App. 1a. The denial by the United States Court of Appeals for the Third Circuit of the petition for rehearing dated August 21, 1997 is reprinted in the Appendix at App. 92a. The February 22, 1996 order and opinion of the District Court for the Eastern District of Pennsylvania is unreported but reprinted in the Appendix at App. 59a.

STATEMENT OF JURISDICTION

Petitioners seek review of the July 24, 1997 Order of the United States Court of Appeals for the Third Circuit that reversed the February 22, 1996 judgement of the United States District Court for the Eastern District of Pennsylvania overturning Respondent's Sentence of Death and upholding his conviction for murder in the first degree. Jurisdiction of this Court to review the judgement of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On June 17, 1983 at approximately 4:15 p.m. Clifford Smith and Roland Alston entered the premises of the Parke-Woodburne

Apothecary, Levittown, Middletown Township, Bucks County, for the purpose of committing an armed robbery. Alston approached a clerk, Doris Forney, displayed a handgun and ordered her and the proprietor, Richard Sharp, a registered pharmacist, to lie on the floor. Alston then ordered both Forney and Sharp to close their eyes; thereafter both he and Smith began removing jewelry from them. Both Forney and Sharp were advised that they would be shot if they offered any resistance. Money was also taken from the store's cash register. While the robbery was in progress, a customer, Casimir Splet, entered the pharmacy. He was immediately accosted by the robbers and was also ordered to lie down upon the floor while his watch was forcibly removed from his wrist and his wallet taken from his back pocket.

After the robbery had been completed, and while the victims were lying on the floor, Forney and Splet heard one loud shot which killed Mr. Sharp. Both Mrs. Forney and Mr. Splet were able to make a positive identification of Roland Alston as one of the robbers. There were also eyewitnesses who were present in the area of the pharmacy either before, during or immediately after the murder of the pharmacist who positively identified both Alston and Smith as the persons who entered the store, and after being inside for a few minutes, left the premises through the same front doorway. An additional witness was able to make a positive identification of the vehicle in which Smith and Alston fled after the homicide.

The jewelry taken from the victims was located pursuant to a search warrant in the homes of two women, Cheryl Yancey and Yvette Barrow, who waited for Smith and Alston in the car during the course of the homicide and robbery. Both Yancey and Barrow testified at trial on behalf of the Commonwealth that Smith was the shooter. In addition to the eyewitnesses' testimony as well as the testimony of the Yancey and Barrow,

the Commonwealth produced scientific and demonstrative evidence indicating that Smith was the robber who shot the pharmacist as he lay on the floor.

On November 22, 1983 the jury returned a verdict finding Smith guilty of first degree murder and fixed the penalty of death on the following day.

Motions for a New Trial were denied by the Court of Common Pleas. On July 1, 1985 Smith was sentenced to death. On July 29, 1986, the Pennsylvania Supreme Court denied Smith's appeal and affirmed the conviction and sentence of death.

The Governor signed a death warrant on August 24, 1990 fixing an execution date. After an evidentiary hearing, the Court of Common Pleas denied Smith relief under the Pennsylvania Post Conviction Relief Act. Smith appealed this decision which was denied by the Pennsylvania Supreme Court. This Honorable Court denied Smith's Petition for Writ of Certiorari. Smith never challenged the jury instructions on the basis of Due Process throughout any of his appeals to the Pennsylvania State courts.

The Governor signed another death warrant scheduling Smith's execution for July 11, 1995. Smith was granted a stay of execution and appointed federal habeas corpus counsel. Smith filed a Petition for Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. After the filing of briefs, a three-day evidentiary hearing and oral argument, the Honorable Harvey Bartle, III upheld Smith's conviction but overturned his death sentence.

The Commonwealth appealed to the United States Third Circuit Court of Appeals and Smith cross-appealed. A panel of the Third Circuit Court of Appeals overturned Smith's conviction

on the basis that the jury instructions violated his right to Due Process. The Commonwealth's Petition for Rehearing In Banc was denied on August 21, 1997.

REASONS FOR GRANTING THE WRIT

I.

ERRORS OF STATE LAW CANNOT BE REPACKAGED AS ISSUES OF CONSTITUTIONAL DIMENSION SIMPLY BY CITING THE DUE PROCESS CLAUSE. IN CONCLUDING THAT THE STATE TRIAL COURT MISDEFINED ACCOMPLICE LIABILITY UNDER STATE LAW AND THUS RELIEVED THE COMMONWEALTH OF ITS BURDEN TO PROVE ALL OF THE ELEMENTS OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT, THE THIRD CIRCUIT EFFECTIVELY FEDERALIZED AND MADE AVAILABLE FOR FEDERAL HABEAS REVIEW ALL ASSERTED ERRORS OF STATE LAW IN JURY INSTRUCTIONS, IN CONTRAVENTION OF THIS COURT'S WELL-ESTABLISHED PRECEDENT.

State statutes define the actions that constitute crimes under state law. By their instructions, state trial judges convey those definitions to juries sitting in state criminal court. Whether a state judge court has correctly instructed a state criminal jury on the elements of a state crime is, of course, a question of state law. Although the law is clear that federal habeas courts do not sit to review putative errors of state law, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Engle v. Isaac*, 456 U.S. 107 (1981), in awarding respondent habeas relief, the Third Circuit did just that, opening the door to large scale federal review of state law issues.

Here, the Third Circuit itself openly acknowledged that it was applying state law, the Pennsylvania Supreme Court's decisions in *Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994), and *Commonwealth v. Bachert*, 453 A.2d 931 (Pa. 1982). These cases, in turn, simply apply the well-established common law principle that a non-actor accomplice may be guilty of the first degree murder committed by the principal only if he shares the specific intent to kill. The majority of the Third Circuit Panel concluded that the charge on accomplice liability provided at respondent's trial could have led the jury to believe it could convict respondent of first degree murder as an accomplice so long as he shared the intent to commit any of the crimes with which he was charged and thus that the charge was erroneous as a matter of state law.[1] The opinion below could not make

1. Of course, the Pennsylvania Supreme Court never had an opportunity to consider this argument, since respondent did not object to the charge at trial and did not assert this claim of error on direct appeal or in the post conviction collateral action he pursued after his convictions were affirmed.

Because petitioners did not raise the issue of exhaustion, the Third Circuit proceeded to consider the unexhausted substantive claim, despite the fact that, pursuant to this Court's decision in, 481 U.S. 129, 134-35 (1987), it had the discretion to raise exhaustion *sua sponte*, since the case presented an unresolved question of state law that had an important bearing on resolution of the putative Constitutional issue. Here, the Third Circuit declined to exercise its discretion to apply the exhaustion rule, concluding that the issue of state law was not unresolved (since state law requires specific intent in the accomplice as well as the principal) and because judicial efficiency and the ends of justice supported immediate resolution of the claim.

The Third Circuit's facile disregard of the exhaustion rule merely demonstrates the extent to which it was willing to reach out to consider a question of state law. The state law question here is not what proof is required to convict a defendant of first degree murder as an accomplice,

(Cont'd)

clearer that the court's award of relief was premised upon a perceived error of state law. The majority expressly states that the trial court's instructions on accomplice liability as it related to first-degree murder were "contrary to Pennsylvania law" *Smith v. Horn*, 120 F.3d 400, 410 (3d Cir. 1997).

Having found an error of state law, the majority then

(Cont'd)
as the Third Circuit suggests, but whether the jury instruction respondent challenged misstated what is necessary to prove. This is classically a matter for state court decision — whether state jury instructions ran afoul of state law requirements. Even if due process concerns lurk within that question, the exhaustion rule exists precisely to allow the state courts to develop the necessary record and provide relief where appropriate. The interests of comity and federalism could not be more diminished than where, well over a decade after the crime, a federal habeas court awards a new trial for a particularly cold-blooded murder without having afforded the state courts the opportunity to pass upon a claim of error grounded in state law.

Nor do the interests of judicial efficiency and the ends of justice support the court's decision to forge ahead to resolve an unexhausted claim. It was respondent who brought a brand-new, unexhausted claim to the federal court, thus attempting to evade state review. Any delay that dismissal of his petition for further state review would have occasioned must certainly be charged to him. The ends of justice clearly do not support the Third Circuit's chosen course. It is entirely antithetical to notions of comity and federalism to presume, as the lower court seems to have done, that if relief is deserved, the state courts will fail to provide it. The state courts are charged with serving the ends of justice no less than federal habeas courts. Moreover, the court below concedes that respondent was involved in at least felony murder, though given the passage of time since his original trial and the difficulty of retrial at this late date, the possibility of conviction for any crime has necessarily diminished. Whether the ends of justice are well served by affording a new trial because of a perceived ambiguity in a state jury instruction — is surely open to question.

converted (or "alchemized" according to the dissent) the error into a due process violation by concluding that the charge relieved the Commonwealth of its burden to prove all of the elements of first degree murder which include the specific intent to kill, beyond a reasonable doubt. This conclusion was possible, however, **only** because the Court had already determined that the state trial court committed an error of **State** law. In other words, the perceived due process violation was premised upon the previous finding of an error of state law, a determination that the court below was not competent, and had no jurisdiction, to make.

On this rationale **any** claimed error or ambiguity in a state court's instructions on matters of state law may provide the basis for a due process claim and thus for federal habeas relief, a result that is entirely antithetical to well established precepts that govern habeas jurisprudence.

Here, the trial court **correctly** instructed the jury on the principles of accomplice liability, tracking the language of the provisions of the Pennsylvania Crimes Code that define accomplices and accomplice liability, 18 Pa. C.S. § 306, and accurately explaining that an individual is an accomplice to a crime only

> if with the intent of promoting or facilitating the commission of a crime, he solicits, commands, encourages or requests the other person or persons to commit that crime or crimes, or aide or agree to aid or attempts to aid the other person in planning or committing the crime.[2]

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2. The Pennsylvania statute defining accomplice liability provides:

> When causing a particular result is an element of an offense,

(Cont'd)

The court also **correctly** instructed the jury on the elements of first degree murder:

> [T]he elements of first degree murder are the unlawful killing of another done intentionally, that is, willfully, deliberately, and with premeditation, plus malice, as I will define that term to you. If these elements are established beyond a reasonable doubt, you may, on the theory that one was the perpetrator and the other the accomplice, find Clifford Smith guilty of murder in the first degree. . . .

(Cont'd)

> an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

18 Pa. C.S. § 306(d).

> A person is an accomplice of another person in the commission of an offense if:
>
> (i) with the intent of promoting or facilitating the commission of the offense he:
>
> (i) solicits such other person to commit it; or
>
> (2) aids or agrees or attempts to aid such other person in planning or committing it.

18 Pa. C.S. § 306(c).

Thus, in order for an "accomplice" to be criminally liable for a particular offense, he must have the intent of promoting or facilitating the offense, *i.e.*, he must at a minimum possess the necessary intent that is required for a conviction of the offense as a principal.

According to the Third Circuit, the fatal flaw in these instructions arose from the trial judge's failure to remind the jury, as he charged on first degree murder, that to convict respondent of that crime as an accomplice, it must find that he intended to promote or facilitate "that crime." In other words, the purported problem here was the failure to resupply the jury with the definition of an accomplice and accomplice liability which has previously correctly provided, each time he charged on a substantive offense. As the dissent correctly observes, a trial judge is not generally required to repeat the definition of a complicated legal term every time he subsequently employs it. *Smith v. Horn*, 120 F.3d at 423 (Alito, J. dissenting). Nor, as the dissent also observes, has this Court ever held that the Due Process Clause is violated whenever a state trial judge, in instructing a jury on the elements of a state offense, uses ambiguous language that, if construed in a particular way, prejudices the defendant. *Id.* at 425.

Conceding this, the majority nonetheless purports to predict "how [this] Court would decide if it were to consider the case. . . ." 120 F.3d at 416. The Court now has the opportunity to consider the case and to reaffirm the principle that federal habeas courts do not sit as super courts of appeals to review issues of state law. Contrary to the decision below, this was not a case in which the jury instructions — in contrast to the conclusive presumptions or mandatory rebuttable presumptions at issue in *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985); and *Carella v. California*, 491 U.S. 263 (1989), upon which the majority relies — expressly relieved the prosecution of its burden to prove all of the elements of the crimes charged beyond a reasonable doubt. Rather, this was a case in which at most the instructions created an ambiguity that, viewed in the Third Circuit's favored way, amounted to an error of state law.[3] Errors of state law do not ipso facto amount

3. The instructions at issue in *Sandstrom*, *Francis*, and *Carella* were (Cont'd)

to due process violations and simply do not provide bases for federal habeas relief. *Estelle v. McGuire*, 502 U.S. 62.

The decision below effectively transforms any suppos ed error in a jury instruction defining a state statutory offense in to a viable issue for federal habeas review upon the theory that t he error relieved the state of its burden of proof and thus violat ed due process. The Third Circuit's extension of Sandstrom, *et al.* is not supported by existing federal habeas jurisprudence a nd represents a dangerous precedent by which federal courts m ay usurp the authority of state courts to define what constitut es criminal behavior under state law. The decision should b e reviewed and reversed.

II.

ANY ERROR IN THE TRIAL COURT'S INSTRUCTIONS ON ACCOMPLICE LIABILITY AND FIRST DEGREE MURDER WAS HARMLESS.

Even if the trial court's charge on accomplice liability as applied to the crime of first degree murder was erroneous, an d if this error somehow became a federal issue, the error was nonetheless harmless. First, the trial evidence established beyon d all doubt that respondent and Roland Alston were the two me n who robbed the Parke-Woodburne Apothecary, as even the Thir d Circuit recognized. *Smith v. Horn*, 120 F.3d at 404, 418. Secon d, although there was no eyewitness to the actual shooting of Richard Sharp, the circumstantial evidence plainly showed th at

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(Cont'd)
incorrect as a matter of **federal** Constitutional law. Here, as the majori ty concedes, the Constitution does not require an accomplice to share a specific intent to kill to be found guilty of first degree murde r. Pennsylvania law requires it. Thus, the error the majority perceives is a n error of state law.

respondent was the shooter: Immediately after the crime, in the presence of two witnesses and in response to Alston's demand to know why he had shot the victim, respondent replied that he "had to." Respondent also complained that he should be permitted to keep a ring stolen during the robbery, since he was the one that killed the man. Moreover, respondent's shoes had human blood on them. Furthermore, ballistics evidence revealed that codefendant Alston's weapon had not been fired. Thus, the evidence indicated that respondent was the killer; none of the evidence pointed to Alston as the triggerman.

The Third Circuit discounted what it termed the strongest evidence of respondent's role in the killing, his admissions, because they were provided by accomplices, two women who had accompanied respondent and Alston to the pharmacy and waited for them in the car while they committed the robbery. That the Third Circuit may have been less than impressed with the witnesses' credentials, does not significantly diminish the compelling nature of their testimony. Moreover, the ballistics and physical evidence, which the Third Circuit does not even mention in its discussion of harmless error, corroborated their version of the events. Nor does the Third Circuit discuss the significance of the complete absence of any evidence suggesting that Alston was the shooter.

Finally, the jury demonstrated by its verdict-finding respondent guilty of conspiracy to murder that they had found he harbored a specific intent to kill. Although this verdict did not specify which degree of murder the jury found respondent had conspired to commit, conspiracy to commit second or third degree murder is a legal and logical impossibility under Pennsylvania law. Second degree (felony) murder is a killing committed in furtherance of a felony. Second degree murder does not require a shared specific intent to kill, only a shared intent to commit the felony, in this case robbery. If one conspires

(agrees) to commit a *killing* in furtherance of such a felony, as for example to facilitate escape or to preclude a later identification, one is necessarily agreeing and planning — *i.e.*, specifically intending — to kill, thus conspiring to commit first degree murder. One cannot agree to a second-degree murder, for second degree murder does not involve the intent to kill. Similarly, a defendant cannot conspire to commit third degree murder, which is an unintentional killing. One cannot agree to commit an unintentional act. Thus, by finding respondent guilty of conspiracy to commit murder, even though it did not identify the degree of murder to which it found he conspired, the jury **necessarily** found a conspiracy to commit first degree murder, the only kind of murder about which agreement is possible. Thus, any error in the charge on accomplice liability in regards to first degree murder clearly had no effect on the verdict, since by finding respondent agreed to kill, the jury necessarily found that harbored a specific intent to kill, either as principal or accomplice.

Given the strength of the evidence that respondent was the actual killer, the utter absence of evidence that Alston was the killer, and the verdict concluding that respondent agreed to the commission of murder, it simply cannot be concluded that the jury instruction error that the Third Circuit identified "had substantial and injurious effect or influence in determining the jury's verdict.", *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). For this additional reason, the decision of the Third Circuit awarding a new trial to this duly convicted criminal defendant should be examined by writ of certiorari.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 24, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-9001 and 96-9002

CLIFFORD SMITH

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; JAMES PRICE, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

District Attorney of Bucks County,
Appellant No. 96-9001

CLIFFORD SMITH,

Appellant No. 96-9002

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; JAMES PRICE, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

Appendix A

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 95-cv-03671)

Argued March 11, 1997

BEFORE: MANSMANN, COWEN and ALITO, *Circuit Judges*

(Filed July 24, 1997)

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Appendix A

OPINION OF THE COURT

COWEN, *Circuit Judge.*

This is an appeal from a judgment of the district court granting in part petitioner-appellee/cross-appellant Clifford Smith's petition for a writ of habeas corpus. The district court held that certain comments made by the prosecutor at the penalty phase of Smith's trial for first-degree murder violated Smith's rights pursuant to the Eighth and Fourteenth Amendments. The district court further held that the failure of Smith's attorney to object to these comments violated Smith's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments. The district court rejected Smith's claim that instructions to the jury at the guilt phase of the trial, concerning the elements of first-degree murder pursuant to Pennsylvania law, violated Smith's right to a fair trial pursuant to the Due Process Clause of the Fourteenth Amendment. Similarly, the district court rejected Smith's arguments that other constitutional errors occurred at the penalty phase.

Respondents-appellants/cross-appellees ("Pennsylvania" or "the Commonwealth") contend that the district court erred in its determination that the prosecutor's closing argument at the penalty phase, and the failure of Smith's attorney to object to that argument, violated Smith's federal constitutional rights. Smith cross-appeals, contending that the district court erred in denying him habeas relief with regard to his conviction for first-degree murder, and in rejecting his other arguments for granting relief based on alleged defects at the penalty phase.

We agree with Smith that errors in the jury instructions at the guilt phase of his trial violated his rights pursuant to the

Due Process Clause of the Fourteenth Amendment. We thus do not reach the district court's holding that errors at the penalty phase violated Smith's rights pursuant to the Sixth, Eighth, and Fourteenth Amendments. We also do not reach Smith's arguments concerning other claims of error that occurred at the penalty phase. Accordingly, we will vacate the judgment of the district court in part, reverse in part, and remand with directions to grant habeas relief.

I.

On November 22, 1983, in the Court of Common Pleas, Bucks County, Pennsylvania, Smith was convicted of first degree murder, among other crimes. The evidence at trial showed that on June 17 of that year, Smith and Roland Alston entered a pharmacy with the intention of robbing it, that they forced three persons inside the store to lie in a prone position on the floor as they committed the robbery, and that one of the robbery victims, Richard Sharp, sustained a fatal gunshot wound to the head.

Yvette Barrow and Cheryl Yancey, who later pled guilty to being accomplices to the robbery, testified that Alston and Smith committed the robbery while Barrow and Yancey waited in Barrow's car. One eyewitness saw Alston and Smith enter and leave the pharmacy at the time of the robbery. A second eyewitness saw the pair walk in the direction of the pharmacy just prior to the robbery. A third eyewitness identified the car in which Smith and Alston were traveling just after the robbery. All three independent eyewitnesses identified the clothing worn by the robbers, which was later found at the homes of Alston, Yancey, and Frances Atkins, Smith's former girlfriend. Items taken from the three robbery victims were later found at the homes of Barrow and Yancey.

Appendix A

Although there was evidence that both Alston and Smith carried handguns that day, the evidence tended to show that Smith actually committed the killing. According to the Commonwealth, Barrow testified that immediately after the murder, Alston yelled at Smith, "Why did you shoot the motherf[uck]er, why did you shoot him?" Appellant's Br. at 11.[1] Smith responded, "He walked into the store and he scared me — the guy lifted his head and I had to do it, I had to do it." *Id.* Barrow also testified that Smith told Alston that "[s]ince [Smith] did the murder, he wanted the ring" that was one of the proceeds of the robbery. *Id.* Yancey similarly testified that Alston yelled at Smith, "Why did you shoot that motherf[uck]er, man? You almost shot me," to which Smith replied, "I had to." *Id.* She also testified that Smith stated that "he should have the ring because he's the one that killed the man." *Id.* There was also evidence that Smith's shoes had human blood on them. Finally, there was evidence that unbred cartridges found at Yancey's house had been loaded into and ejected from Alston's pistol, indicating that Alston's weapon had not been fired.

At the guilt phase of the trial, the district attorney made the following comments in closing argument:

> [W]ho shot Richard Sharp is of no moment in this trial, because as His Honor will tell you, it makes no

---

1. Because Smith has not contested the version of the trial testimony related in the Commonwealth's briefs, we accept this version as accurate for purposes of this appeal. Nonetheless, we feel the need to express our bafflement at the Commonwealth's disregard of 3d Cir. LAR 30.3(a) (1993) ("Relevant portions of a trial transcript . . . referred to in the briefs shall be included in the appendix . . . ."). In light of the importance of the testimony in question to the Commonwealth's position, it cannot be disputed that this testimony is "[r]elevant."

difference under the law and under the facts. It doesn't make one bit of difference who shot Mr. Sharp, because *if you find as a fact*, and I suggest you can based on the evidence, *that Richard Sharp was killed by either Roland Alston or Clifford Smith, you can find as a fact that there was murder in the first degree.* It makes no difference who pulled the trigger. *The acts of one accomplice are the acts of the other. The doings of one are the doings of the other.*

. . . .

. . . [I]t makes no difference who fired the fatal shot . . . [F]or your purposes, it doesn't make any difference. *The act of one is the act of the other. . . .*

. . . .

. . . [I]f you find that this defendant or both defendants or *either of them had the conscious purpose to take human life*, you can find as a matter of fact and as a matter of law that it's murder in the first degree. . . .

. . . .

. . . [I]f you find that either Smith or Alston fired that bullet . . . if you find that either did this, *both as conspirators or as accomplices are guilty of the crime of first degree murder.*

. . . .

. . . Does the evidence indicate that Clifford Smith

> or Roland Alston, *either* or both of them, *made a conscious decision to take human life, a willful, a deliberate, an intentional* killing, no accident?

Cross App. at 1007-08, 1010, 1012-13, 1014, 1017 (emphasis added).

The court first instructed the jury on homicide without reference to any specific offense or degree:

> [I]f . . . you find that Smith and Alston were accomplices of each other, then it is not important for you to determine which one actually pulled the trigger that brought about the killing of Richard Sharp, *if you find beyond a reasonable doubt that one of the two did so and were [sic] acting as the accomplice of each other at the time.* In order, however, to find Clifford Smith to be guilty, you need not conclude, as I said, that he was the actor; that is, if I can use the word "shooter," but he was, nevertheless, *acting as an accomplice of Alston* and it was his intent of promoting or facilitating that act and the killing was done in furtherance of the robberies, if you so find, then he would be guilty as though he were the actual perpetrator. . . .
>
> . . . [T]he Commonwealth must prove all of the elements of the case beyond a reasonable doubt, but they do not have to prove beyond a reasonable doubt which of the two, Smith or Alston, actually brought about the killing of Richard Sharp by showing who pulled the trigger and placing [sic] the shot in his head. *If, and I emphasize this, you find that one was the*

> *accomplice of the other and that one of the two actually performed the killing, you, the jurors, need not agree on the role or roles played by the respective parties; that is, by this defendant and his accomplice, if you find that that was the position of both, provided that each of you is satisfied that the crime was actually perpetrated by the defendant or by the accomplice of the defendant.* Conversely, if you find that one was not the accomplice of the other but that a criminal homicide occurred, then you must determine who performed the act of killing and, of course, it follows that if Alston was the killer and Smith was not his accomplice, he, Smith, would not be guilty of the crime of murder for the Commonwealth has not proven this accomplice theory beyond a reasonable doubt.

Id. at 1030-31, 1031-32 (emphasis added).

The court then instructed the jury specifically on first-degree and second-degree murder:

> [T]he elements of first degree murder are the unlawful killing of another person done intentionally; that is, willfully, deliberately and with premeditation, plus malice, as I will define that term to you. *If these elements have been established beyond a reasonable doubt, you may, on the theory that one was the perpetrator and the other the accomplice, find Clifford Smith guilty of murder in the first degree . . . .*
>
> . . . You may find the defendant guilty of second degree murder if you are satisfied that the following elements have been proven beyond a reasonable doubt:

> First, again you must find that a person caused the death of Richard Sharp. *Secondly, that the defendant, or an accomplice of the defendant, was the person who killed him.* Thirdly, that the killing was committed while the defendant was engaged, or an *accomplice* was engaged, in the commission of . . . the felony of robbery. Fourth, *that the act of the defendant, or the defendant's accomplice, that brought about the killing and death of Richard Sharp* was done in furtherance of that robbery. Fifth, that the killing was with malice on the part of the defendant [which] may be inferred by you if you conclude that the defendant was engaging in, or was an accomplice in, the commission or attempted commission of a felony dangerous to human life . . . .

Id. at 1035, 1035-36 (emphasis added).

The court then instructed the jury on the crime of conspiracy, without reference to a specific substantive crime:

> You should . . . determine . . . *whether there was the requisite intent to enter into this conspiracy to commit the robbery and the killing which the Commonwealth contends flowed therefrom or whether there was the requisite intent to enter in and be the accomplice with the other in bringing this about.* That is to say, *did Clifford Smith agree*, although not necessarily by words, but by conduct and circumstances to *bring about this robbery which, in turn, led to the ultimate shooting*, so the Commonwealth contends, and the killing of Richard Sharp? *If so, then the major basis of conspiratorial liability exists as to him.*

Id. 1047-48 (emphasis added).

Finally, the court distinguished among the different degrees of murder:

> You would . . . have to decide *whether the act of the perpetrator, or his accomplice, at the time of the killing was acting [sic] with malice*, as we have defined that term to you. Was he acting willfully, deliberately and with premeditation, although at that time not having the specific intent to kill, but having the specific intent to inflict grievous bodily harm upon Richard Sharp, *because that really is the distinction between third degree murder and first degree murder. . . .*
>
> If you would conclude that there was specific intent to take life, you would then have to determine if it was second degree murder, or as we call it felony murder, because it involves killing incidental to a felony. . . . [F]or persons to be accomplices in felony murder they must have a common design. In other words, the shared intent to commit that felony, the robbery in this case, and in furtherance thereof the killing was perpetrated as a natural act which flowed from the robbery itself. However, . . . even though you would conclude that there was the felony of robbery committed, but would further conclude that all of the elements of first degree murder were present, you . . . would be justified in returning a verdict of first degree murder, if you determine beyond a reasonable doubt that *the killing was intentional*; that is, that *there was a specific conscious intent to kill and this was done willfully, deliberately, and with premeditation.*

Id. at 1057-58 (emphasis added).

Appendix A

Smith was convicted of, *inter alia*, first-degree murder and conspiracy to commit murder. He was not convicted of conspiracy to commit first-degree murder. At the penalty phase of the trial, the jury found two aggravating factors and no mitigating factors. The jury imposed the death penalty, which it was required to do under these circumstances pursuant to Pennsylvania law. *See* 42 Pa. Cons. Stat. Ann. §9711(c)(1)(iv) (West 1982).

Smith filed a motion for a new trial, which was denied by the trial court on June 18, 1985. Smith subsequently was sentenced to death. He then appealed his conviction and sentence to the Supreme Court of Pennsylvania. On July 29, 1986, the judgment was affirmed, and Smith's petition to the Supreme Court of the United States for a writ of certiorari was denied thereafter. *See Commonwealth v. Smith*, 513 A.2d 1371 (Pa. 1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617 (1987) ("*Smith I*").

The Governor of Pennsylvania subsequently signed Smith's death warrant, fixing his execution for November 13, 1990. On October 16, 1991,[2] Smith filed a petition in the Court of Common Pleas, Bucks County, pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§9541-9546 (West 1996 Supp.). His execution was stayed several days later. After holding an evidentiary hearing, the court denied the petition. The Supreme Court of Pennsylvania affirmed on November 22, 1994, and the United States Supreme Court denied Smith's petition for a writ of certiorari. *See Commonwealth v. Smith*, 650 A.2d 863 (Pa. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 1799 (1995).

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2. The record does not indicate why Smith's execution was stayed past November 13, 1990.

In May of 1995, the Governor of Pennsylvania again signed Smith's death warrant, fixing July 11, 1995, as the date of execution, On June 30, 1995, the district court granted Smith a stay of execution. Smith subsequently filed the instant petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254 (1994). That court held an evidentiary hearing. On February 22, 1996, the court granted the petition in part and denied it in part on the grounds that the prosecutor's comments in summation at the penalty phase violated Smith's Eighth and Fourteenth Amendment rights pursuant to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), and *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446 (1983). The district court also held that the failure of Smith's counsel to object to the closing argument constituted ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. The district court rejected Smith's contention, regarding the guilt phase, that the jury instructions on first-degree murder denied him due process. It also rejected Smith's additional arguments concerning the penalty phase that his sentence violated the federal constitution. The court ordered that Smith be either re-sentenced or released from confinement within 180 days, and stayed its order pending appeal. *See Smith v. Horn*, No. CIV. A. 95-3671, 1996 WL 172047 (E.D. Pa. Feb. 22, 1996).

This appeal and cross-appeal followed.

II.

As an initial matter, we find it necessary to address two issues raised by the dissent. The dissent suggests, for the first time, that we require the parties to brief the threshold procedural issues of exhaustion of state remedies and procedural default. *See* Dissent slip op. at 38, 40. We note at the outset that the

Commonwealth never raised either of these issues at any time: not in the district court, not in its briefing before this Court, and not at oral argument.

A.

The dissent concedes that it is likely an exhaustion argument would fail on the grounds that further state review of the due process issue would be foreclosed to Smith. *See id.* at 37-38. Nevertheless, the dissent presses the point, arguing that this might present a case where the Pennsylvania courts would apply the narrow "miscarriage of justice" exception to the stringent requirements of the PCRA. *See Doctor v. Walters*, 96 F.3d 675, 681-83 (3d Cir. 1996). In *Doctor*, 96 F.3d at 683, we concluded that we ought to require exhaustion unless there is "no chance that the Pennsylvania courts would find a miscarriage of justice."

However, in that case, the exhaustion issue was raised and addressed in the district court. *See id.* at 678. Where the issue was never raised in the district court, we are afforded discretion pursuant to *Granberry v. Greer*, 481 U.S. 129, 134, 107 S.Ct. 1671, 1675 (1987), to "determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim." *See also Evans v. Court of Common Pleas*, 959 F.2d 1227, 1233 (3d Cir. 1992); *Brown v. Fauver*, 819 F.2d 395, 398 (3d Cir. 1987). We must exercise our discretion on a case-by-case basis and with reference to the values of, not only comity and federalism, but also "judicial efficiency," *Granberry*, 481 U.S. at 135, 107 S.Ct. at 1675, and "the ends of justice," *Keller v. Petsock*, 853 F.2d 1122, 1127 & n.6 (3d Cir. 1988).

The dissent suggests that we ought to exercise our discretion in favor of requiring exhaustion in this case on the ground that it "falls squarely within" the category of cases that " 'present[ ] an issue on which an unresolved question of fact or of state law might have an important bearing,' " Dissent slip op. at 36 (quoting *Granberry*, 481 U.S. at 134-35, 107 S.Ct. at 1675) (alteration added), and "it would be helpful to have the benefit of a decision by the Pennsylvania courts on the underlying issue of state law." *Id.* at 6. *See Brown*, 819 F.2d at 399; *cf. Zettlemoyer v. Fulcomer*, 923 F.2d 284, 309-10 (3d Cir. 1991). However, this case presents no "unresolved question . . . of state law." *Granberry*, 481 U.S. at 134, 107 S.Ct. at 1675. The only question of state law presented — the elements of first-degree murder in Pennsylvania — has been resolved by the Pennsylvania Supreme Court, not once but twice. *See infra* at 16-18. No one disputes that specific intent to kill is one of those elements. All remaining questions presented by this case — whether there is a reasonable likelihood that the jury understood its instructions in a certain way, whether this understanding had the effect of relieving the Commonwealth of the burden of proving this element beyond a reasonable doubt, and whether this error was harmless — present issues of federal law.

Accordingly, we see no reason to delay review of this petition in order to provide briefing on an issue the Commonwealth never raised in any court and on which even the dissent concedes the Commonwealth has very little chance of succeeding.

B.

The dissent also suggests that we direct the parties to brief the related issue of procedural default. The dissent correctly

notes that we and several of our sister circuits have held that this issue may be raised sua sponte by the court of appeals. *See* Dissent at 38 (citing *Hull v. Freeman*, 932 F.2d 159, 164 n.4 (3d Cir. 1991), *overruled on other grounds by Caswell v. Ryan*, 953 F.2d 853 (3d Cir. 1992), *Ortiz v. Dubois*, 19 F.3d 708, 714 (1st Cir. 1994), *Washington v. James*, 996 F.2d 1442 (2d Cir. 1993), and *Hardiman v. Reynolds*, 971 F.2d 500, 502-04 & n.4 (10th Cir. 1992)). Nonetheless, it is evident from these cases that whether we do so is discretionary, and that our discretion is guided by the same considerations as those discussed in *Granberry*. *See Hull*, 932 F.2d at 164 n.4; *Washington*, 996 F.2d at 1448-49; *Hardiman*, 971 F.2d at 504.

In *Washington*, 996 F.2d at 1449-50, the Court of Appeals for the Second Circuit recognized that it might be inappropriate for the court to raise the issue of procedural default sua sponte where " 'it is evident that a miscarriage of justice has occurred' " (quoting *Granberry*, 481 U.S. at 135, 107 S.Ct. at 1675). The court also recognized that "miscarriage of justice" in this context should be defined somewhat more loosely than in the nonexhaustion context because "[u]nlike in exhaustion cases, if we decline to reach the merits in a procedural default case, the defendant has no further recourse to either state or federal relief." *Id.* at 1450. Nevertheless, the court narrowly limited the application of the miscarriage of justice exception to those cases where the habeas petitioner challenges the validity of the trial itself and not just the conviction, and those cases where the claimed federal violation was the product of malice. *See id.*; *see also Ortiz*, 19 F.3d at 715.

We believe, as did Judge Oakes in dissent in that case, that the court unduly limited the meaning of "miscarriage of justice" in contravention of the language of *Granberry*, 481 U.S. at 135,

107 S.Ct. at 1675. *See Washington*, 996 F.2d at 1454 (Oakes, J., dissenting). We agree with Judge Oakes, and with Judge Stahl of the Court of Appeals for the First Circuit, that " 'miscarriage of justice' should include cases where the record is well developed and the merits strongly support the petitioner's claim." *Id.* at 1453 (Oakes, J., dissenting); *see also Ortiz*, 19 F.3d at 717 (Stahl, J., dissenting).

In this case, not only do the merits strongly support Smith's claim, as we shall demonstrate, but the record as it relates to the merits is as well-developed as it can be. We have been presented with the entirety of the charge delivered at Smith's trial. We can lay alongside this charge the unequivocal holdings of the Pennsylvania Supreme Court in two separate cases that specific intent to kill is an essential element of first-degree murder.

By contrast, the record with regard to the procedural default issue itself is sparse. For example, we have not been provided with the crucial jury instruction defining first degree murder requested by Smith's trial counsel and rejected by the trial court. There is similarly nothing in the record with regard to whether Smith can show "cause" for the alleged default (such as by showing that appellate counsel was constitutionally ineffective) and "prejudice" resulting therefrom, or that the procedural rule does not provide an independent and adequate basis for precluding habeas review. *See Doctor*, 96 F.3d at 683. Thus, consideration of the procedural default issue at this late stage in the proceedings would likely require not simply supplemental briefing but a remand to the district court for supplemental fact finding. In these circumstances, where relief is "plainly warranted," *Granberry*, 481 U.S. at 135, 107 S.Ct. at 1676, and consideration of the procedural default defense would result in undue delay, *see Odum v. Boone*, 62 F.3d 327, 330 (10th Cir.

1995); *Manlove v. Tansy*, 981 F.2d 473, 476 n.4 (10th Cir. 1992), we exercise our discretion to decline to raise that defense sua sponte.

C.

With regard to both nonexhaustion and procedural default, we are also persuaded that when the state has never raised an issue in either the district court or this Court we should be even less inclined to raise it sua sponte than when the state either has raised the issue here only belatedly or has raised it in the district court but has not pursued that line of attack in the court of appeals. *But see Washington*, 996 F.2d at 1448 n.3 (stating that complete failure to raise defense should be treated same as belatedly raising defense); *Hardiman*, 971 F.2d at 504 n.6 (same). In any of these situations, consideration of the issue contravenes our standard practice. However, where the issue has been raised either in the district court or the court of appeals, we are at least maintaining our roles as judges, addressing only the issues flagged, at some point, by the parties. Moreover, we are often aided in our endeavor by the fact that the district court has addressed the issue.

By contrast, where the state has never raised the issue at all, in any court, raising the issue sua sponte puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates. *See United States v. Burke*, 504 U.S. 229, 246, 112 S.Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment) ("The rule that points not argued will not be considered . . . at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.");

accord Hardiman, 971 F.2d at 505. While considerations of federalism and comity sometimes weigh in favor of raising such issues sua sponte, consideration of that other great pillar of our judicial system — restraint — cuts sharply in the other direction.

We certainly have the discretion to raise these issues sua sponte. As *Granberry* and its progeny direct, that discretion should be exercised with reference to the values of federalism and comity, judicial efficiency, and the ends of justice. In cases in which an issue has not been raised by either party in either the district court or in this Court, we will decline to address the issue unless consideration of these factors clearly indicates that we should depart from our standard practice. We apply this presumption in such cases lest we subtly transform our adversarial system into an inquisitorial one.

The dissent has not persuaded us that consideration of federalism and comity, judicial efficiency, and the ends of justice clearly dictate that we consider the defenses of nonexhaustion and procedural default. Accordingly, we decline to do so.

III.

Smith argues that the jury instructions rendered by the trial court erroneously informed the jury that Smith could be convicted of first-degree murder even if he did not have the specific intent to kill. He asserts that the jury was incorrectly instructed that if it found beyond a reasonable doubt that one of the men had the specific intent to kill, and that Smith intended to commit the robbery that resulted in the killing, this would be sufficient to convict Smith of first-degree murder. He further argues that this instruction was incorrect under Pennsylvania law, and that this incorrect instruction violated his constitutional

rights. The district court summarily rejected Smith's contention, stating: "Smith has raised several other arguments in his petition concerning both the guilt and penalty phases of his 1983 trial. These we find to be without merit." *Smith v. Horn*, 1996 WL 172047, at *15.

We conclude from a fair reading of the jury instructions that there is a reasonable likelihood that the jury convicted Smith of first-degree murder without finding beyond a reasonable doubt that he intended that Sharp be killed. Such an instruction is contrary to Pennsylvania law. We hold that these jury instructions had the effect of relieving the Commonwealth of its burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law. The delivery of these improper instructions amounted to a violation of Smith's right to a fair trial pursuant to the Due Process Clause of the Fourteenth Amendment. Finally, we hold that this constitutional error was not harmless and that Smith must be discharged unless the Commonwealth determines to retry him for first-degree murder.

A.

Under Pennsylvania law, both today and at the time of Smith's trial, an accomplice or co-conspirator in a crime during which a killing occurs may not be convicted of first-degree murder unless the Commonwealth proves that he harbored the specific intent to kill. *See* 18 Pa. Cons. Stat. Ann. §2502(a) (West 1983); *Commonwealth v. Huffman*, 638 A.2d 961, 962-63, 964 (Pa. 1994); *Commonwealth v. Bachert*, 453 A.2d 931, 936 (Pa. 1982). This is so even where the identity of the actual killer is unknown. *See Huffman*, 638 A.2d at 964-65 (Papadakos, J., dissenting). The Commonwealth need not prove that the

defendant actually performed the killing, *see Commonwealth v. Bachert*, 412 A.2d 580, 583 (Pa. Super. 1979), *aff'd in part, rev'd on other grounds in part*, 453 A.2d 931 (Pa. 1982), but it must prove he intended for the killing to occur. In other words, felony-murder *simpliciter* does not constitute murder in the first degree in Pennsylvania.

In *Bachert*, 453 A.2d at 933-34, the evidence showed that the defendant and a cohort committed a kidnaping and robbery, during the course of which the cohort killed the victim. The Pennsylvania Supreme Court wrote that to constitute first-degree murder, the evidence had to show beyond a reasonable doubt that the defendant harbored "a specific intent to kill." *Id.* at 935. It wrote:

> To determine the kind of homicide of which the accomplice [defendant] is guilty, it is necessary to look to *his* state of mind; the requisite mental state must be proved beyond a reasonable doubt to be one which the *accomplice* harbored and cannot depend upon proof of intent to kill only in the principal.

Id. (emphasis added).

In *Huffman*, 638 A.2d at 962, the trial court had advised the jury that

> "in order to find a Defendant guilty of murder in the first degree, you must find that the Defendant caused the death of another person, *or that an accomplice or co-conspirator caused the death of another person.* That is, you must find that the Defendant's act *or the act of an accomplice or co-conspirator* is the legal

> cause of death of [the victim], and therefore you must determine if the killing was intentional."

(quoting trial transcript) (emphasis added) (alteration in original). This, the Pennsylvania Supreme Court held, was "patently erroneous" and "an outright misstatement of the law on a fundamental issue relating to culpability." *Id.* The court wrote that *Bachert* "express[ly] and unambiguous[ly]" held that an accomplice to an underlying felony that results in death could be convicted of first-degree murder only if the Commonwealth proves that the accomplice specifically intended to kill. *Id.* at 962-63.

The Commonwealth cites in its reply brief two cases in support of the proposition that a shared intent to enter into a conspiracy to commit a crime is sufficient to confer criminal liability for a killing that is the natural and probable result of the conspiracy, even if the killing were not shown to be specifically intended by the defendant. *See Commonwealth v. Roux*, 350 A.2d 867, 870 (Pa. 1976); *Commonwealth v. La*, 640 A.2d 1336, 1345-46 (Pa. Super. 1994). However, neither of these cases involved first-degree murder. *See Roux*, 350 A.2d at 868 (second-degree murder and conspiracy);[3] *La*, 640 A.2d at 1340 (third-degree murder and conspiracy); *see also Huffman*, 638 A.2d at 964 n.9 (criticizing dissent for relying on cases involving manslaughter and lesser degrees of murder). As the Commonwealth unambiguously conceded at oral argument,

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3. Additionally, the events in *Commonwealth v. Roux*, 350 A.2d 867, 869 (Pa. 1976), took place on November 10, 1973. Before March 26, 1974, the definition of murder in the first degree in Pennsylvania included felony-murder. *See* 18 Pa. Cons. Stat. Ann. §2502, Historical Note (1983). Thus, *Roux* would be inapposite even if the defendant there had been convicted of first-degree murder.

Huffman and *Bachert* make clear that specific intent to commit a killing, not simply intent to commit some other crime from which a killing results, is a prerequisite to a conviction for first-degree murder in Pennsylvania. *Cf. Tison v. Arizona*, 481 U.S. 137, 175 n.13, 107 S.Ct. 1676, 1697 n.13 (1987) (Brennan, J., dissenting) (listing Pennsylvania as a jurisdiction that "restrict[s] the imposition of capital punishment to those who actually and intentionally kill").

B.

Our analysis of jury instructions claimed to impair a constitutional right "must focus initially on the specific language challenged." *Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 1971 (1985); *see also Rock v. Zimmerman*, 959 F.2d 1237, 1246 (3d Cir. 1992) (en banc). The allegedly constitutionally infirm language must be considered in the context of the charge as a whole. *See Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 482 (1991); *Flamer v. Delaware*, 68 F.3d 736, 752 (3d Cir. 1995); *Kontakis v. Beyer*, 19 F.3d 110, 115-16 (3d Cir. 1994). The proper inquiry is " 'whether there is a *reasonable likelihood* that the jury has applied the challenged instructions in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72, 112 S.Ct. at 482 (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198 (1990)) (emphasis added); *see also Victor v. Nebraska*, 511 U.S. 1, 6, 114 S.Ct. 1239, 1243 (1994); *Flamer*, 68 F.3d at 752.

A fair reading of the jury instructions given in this case permitted the jury to convict Smith of murder in the first degree without first finding beyond a reasonable doubt that Smith intended that Sharp be killed. Portions of the instructions are ambiguous as to the requisite finding of intent. Other portions

affirmatively inform the jury that it need *not* find beyond a reasonable doubt that Smith specifically intended that the victim die in order for Smith to be guilty of murder in the first degree. Taken as a whole, there is a reasonable likelihood that the jury understood the instructions in this way.

One of the two portions of the jury charge that specifically mentions first-degree murder reads as follows:

> [T]he elements of first degree murder are the unlawful killing of another person done intentionally; that is, willfully, deliberately and with premeditation, plus malice, as I will define that term to you. *If these elements have been established beyond a reasonable doubt, you may, on the theory that one was the perpetrator and the other the accomplice, find Clifford Smith guilty of murder in the first degree. . . .*

Cross App. at 1035 (emphasis added). Taken in isolation, this charge might convey the idea that the jury must find that Smith harbored the specific intent to kill Sharp. This interpretation would be reasonable only if the jury were to understand the word "accomplice" to mean "accomplice in the killing," and not simply "accomplice in the robbery." Only in that way would the instructions convey the critical idea that Smith must be found to have intended to kill Sharp for Smith to be found guilty of first-degree murder.

Taken together with the remainder of the pertinent instructions, it is clear that jury was not made to understand "accomplice" in this way. In other portions of the charge, in which the trial court mentioned the killing but did not specifically discuss first-degree murder, the court generally did not clarify

whether it was using "accomplice" in reference to the robbery, the killing, or both. Further, when it did make the meaning of "accomplice" reasonably clear, it appears that the court was using that term in reference to the robbery only.

For example, the court instructed:

> [T]he Commonwealth must prove all of the elements of the case beyond a reasonable doubt, but [it] do[es] not have to prove beyond a reasonable doubt which of the two, Smith or Alston, actually brought about the killing of Richard Sharp by showing who pulled the trigger and plac[ed] the shot in his head. If, and I emphasize this, you find that one was the *accomplice of the other and that one of the two actually performed the killing*, you, the jurors, need not agree on the role or roles played by the respective parties; that is, by *this defendant and his accomplice*, if you find that that was the position of both, provided that each of you is satisfied that the crime was actually perpetrated by the defendant *or by the accomplice of the defendant.* Conversely, if you find that *one was not the accomplice of the other* but that a criminal homicide occurred, then you must decide who performed the act of killing and, of course, it follows that *if Alston was the killer and Smith was not his accomplice, he, Smith, would not be guilty of the crime of murder* for the Commonwealth has not proven this accomplice theory beyond a reasonable doubt.

Id. at 1031-32 (emphasis added).

The court also instructed:

> [I]f . . . you find that Smith and Alston were *accomplices* of each other, then it is not important for you to determine which one actually pulled the trigger that brought about the killing of Richard Sharp, if you find beyond a reasonable doubt that one of the two did so and were [sic] *acting as the accomplice of each other at the time.* In order, however, to find Clifford Smith to be guilty, you need not conclude, as I said that he was the actor; that is, if I can use the word "shooter," but he was, nevertheless, *acting as an accomplice of Alston* and it was his intent of promoting or facilitating that act and the killing was done in furtherance of the robberies, if you so find, then he would be guilty as though he were the actual perpetrator.

Id. at 1030-31 (emphasis added).

The jury was further instructed on "the distinction between third degree murder and first degree murder." *Id.* at 1057. Murder in the third degree occurs where "the perpetrator,[4] *or his accomplice* . . . [w]as . . . acting willfully, deliberately and with premeditation, although . . . not having the specific intent to kill." *Id.* (emphasis added). The clear implication is that first-degree murder occurs where "the perpetrator, *or his accomplice*" *did* have "the specific intent to kill."

In these portions of the charge, the court did not clarify whether "accomplice" means "accomplice in the killing," "accomplice in the robbery," or both. The charge thus blurred the distinction between "accomplice in the robbery" and

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4. The court presumably meant "the defendant": by definition, the "perpetrator" necessarily did the "acting."

"accomplice in the killing," leading the jury to believe that an accomplice for one purpose is an accomplice for all purposes. This confusion was exacerbated when, in the course of enumerating the elements of second-degree murder, the court repeatedly used the word "accomplice" to mean "accomplice in the robbery." Without an explicit disclaimer, it is extremely unlikely that the jury understood the same word to have two different meanings when used only moments apart in the same charge. The charge thus allowed Smith to be convicted of first-degree murder if the jury found that either he or his accomplice *in the robbery* intended to kill Sharp.

Additionally, with regard to the conspiracy counts, the court instructed: "You should . . . determine . . . whether there was the requisite intent to enter into this conspiracy to commit the robbery *and the killing which the Commonwealth contends flowed therefrom* or whether there was the requisite intent to enter into and be the accomplice with the other in bringing *this* about" *Id.* at 1047 (emphasis added). In this portion of the charge, it is unclear whether one could have the "requisite intent to enter into th[e] conspiracy to commit the robbery," without also having the "requisite intent to enter into the conspiracy to commit the . . . killing which the Commonwealth contends flowed" from the robbery. It is likely that a reasonable juror would have inferred that the "requisite intent to enter into th[e] conspiracy to commit the robbery" also necessarily establishes the "requisite intent to enter into th[e] conspiracy to commit . . . the killing which . . . flowed therefrom." The court's conflation of the two independent requirements of intent was aggravated by the court's next instruction that the jury determine "whether there was the requisite intent to enter into and be the accomplice with the other in bringing *this* about," without clarifying whether the "this" referred to the robbery, the killing, or both.

The court immediately attempted to explain the above instruction, but in doing so it conveyed the impression that Smith was criminally liable for conspiracy to commit murder if he intended to enter into a conspiracy to commit *robbery*:

> That is to say, *did Clifford Smith agree*, although not necessarily by words, but by conduct and circumstances to *bring about this robbery which, in turn, led to the ultimate shooting*, so the Commonwealth contends, and the killing of Richard Sharp? *If so, then the major basis of conspiratorial liability exists as to him.*

Id. at 1047-48 (emphasis added). The court did not clarify to which crime this "conspiratorial liability" applies; the charge was given in the context of the general conspiracy instruction. Thus, it is likely that the jury understood this charge as instructing that Smith could be found guilty of conspiracy to commit first-degree murder if he intended to commit the robbery, even if he did not intend that the killing be committed.

The closest the court came to instructing the jury that specific intent on the part of Smith was necessary to convict him of first-degree murder was the following: "[Y]ou . . . would be justified in returning a verdict of first degree murder, if you determine beyond a reasonable doubt that the killing *was intentional*; that is, that *there was a specific conscious intent to kill* and *this was done willfully, deliberately, and with premeditation*." *Id.* at 1058 (emphasis added). However, this language fails to convey the crucial point that the jury must find that *Smith*, as opposed to Alston, intended the killing to occur in order for Smith to be found guilty of murder in the first degree. Thus, this portion of the charge is "not rhetorically inconsistent,"

Rock, 959 F.2d at 1248, with the portions that convey the idea that an intent on the part of Alston to kill, coupled with Smith's participation in the robbery, rendered Smith guilty of first-degree murder.

The Commonwealth contends that we are bound by the Pennsylvania Supreme Court's determination, on Smith's direct appeal, that the instructions fairly conveyed to the jury the elements of first-degree murder. The court wrote: "We have reviewed the record in the present case and find no inadequacies in the trial court's instructions as to elements of the crime of murder of the first degree and as to pertinent requirements of criminal culpability." *Smith I*, 513 A.2d at 1377. Nonetheless, where an allegedly faulty jury charge implicates a habeas petitioner's federal constitutional rights, as we conclude in the next section this charge did, we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue. *See Francis*, 471 U.S. at 315-16, 105 S.Ct. at 1972; *Sandstrom*, 442 U.S. at 516-17, 99 S.Ct. at 2455; *Kontakis*, 19 F.3d at 116.

The dissent contends that the trial court's initial rendition of the meaning of "accomplice" pursuant to Pennsylvania law adequately conveyed to the jury that each subsequent use of the term was offense-specific. *See* Dissent slip op. at 42-43. The court instructed:

> [A]n accomplice is a person if with the intent of promoting or facilitating the commission of a crime he solicits, commands, encourages or requests the other person or persons to commit that crime or crimes, or aids, agrees to aid, or attempts to aid the other person in the planning or committing the [sic] crime.

App. at 1029. Yet nothing in this charge would lead the jury to think that, when the court instructed the jury on murder, and the court used the word "accomplice," that word meant only "accomplice in the murder." Indeed, this charge reinforces the notion that an accomplice for one purpose is an accomplice for all purposes. There is at least a reasonable likelihood that, without further elaboration, the jurors understood the instruction as stating that if Smith harbored "the intent of promoting or facilitating the commission of *a* crime [robbery] [and] he solicit[ed], command[ed], encourage[d] or request[ed] [Alston] to commit *that* crime [robbery] or aid[ed], agree[d] to aid, or attempt[ed] to aid [Alston] in . . . planning or committing *the* crime [robbery]," then Smith is "*an accomplice.*" *Id.* (emphasis added). The dissent seeks mightily to read into this charge the additional words that might have conveyed the correct impression — "an accomplice *in that crime*" or "an accomplice *for purposes of that crime.*" That critical impression, however, was not conveyed.

The Commonwealth urges that, taken as a whole, the charge informed the jury that it must find that Smith intended for the killing to occur in order to convict him of first-degree murder. However, the Commonwealth has cited us no additional language from the charge concerning the elements of first-degree murder. Indeed, we have quoted above the entirety of the charge as pertinent to the first-degree murder count and, taken as a whole, we must conclude that there is at least a reasonable likelihood that the jury understood the charge as imposing upon the Commonwealth no burden of proving that Smith intended for the victim to die in order to convict Smith of first-degree murder.

C.

Having determined that the jury instructions in this case were incorrect, we must further determine whether the error is of constitutional magnitude. " '[I]t is well established that a state court's misapplication of its own law does not *generally* raise a constitutional claim. The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.' " *Johnson v. Rosemeyer*, No. 96-1861, 1997 WL 318064, at *5 (3d Cir. June 13, 1997) (quoting *Geschwendt v. Ryan*, 967 F.2d 877, 888-89 (3d Cir. 1992) (en banc)) (alteration and emphasis added). However, this does not foreclose the possibility that, in the rare case, "a state court's misapplication of its own law" may itself result in a "wrong[] of constitutional dimension." In other words, a state court's misapplication of its own law, in and of itself, cannot be corrected by a federal court. However, when that misapplication has the effect of depriving a person of life, liberty, or property without due process of law in violation of the Fourteenth Amendment, the resulting federal constitutional error can be corrected by a federal habeas court. *See Gilmore v. Taylor*, 508 U.S. 333, 348-49, 113 S.Ct. 2112, 2121 (1993) (O'Connor, J., concurring in the judgment). On the other hand, "errors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause." *Johnson*, 1997 WL 318064 at *6. We conclude that the jury instruction at issue here was not merely an error of state law. By removing the Commonwealth's burden of proving beyond a reasonable doubt one of the essential elements of the crime of first-degree murder, the instruction also contravened the Due Process Clause of the Fourteenth Amendment.

It is axiomatic that Pennsylvania may, within certain

constitutional limits, define first-degree murder in whatever way the Commonwealth sees fit. *See McMillan v. Pennsylvania*, 477 U.S. 79, 85, 106 S.Ct. 2411, 2415-16 (1986); *Johnson*, 1997 WL 318064 at *6. It certainly may include within that definition felony-murder. Indeed, many states do include such killings in their definitions of first-degree murder. *See Tison*, 481 U.S. at 152-54 & nn.5-9, 107 S.Ct. at 1683-86 & nn.5-9. Pennsylvania itself defined first-degree murder in this way until 1974. *See* 18 Pa. Cons. Stat. Ann. §2502, Historical Note. The Supreme Court has held that the inclusion of felony-murder within the definition of first-degree murder, and the consequent imposition of the death penalty, does no violence to the federal Constitution so long as the defendant was a major participant in the felony and exhibited a reckless indifference to human life. *See Tison*, 481 U.S. at 158, 107 S.Ct. at 1688.

However, once the state has defined the elements of an offense, the federal Constitution imposes constraints upon the state's authority to convict a person of that offense. It is well-settled that "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970); *see also Victor*, 511 U.S. at 5, 114 S.Ct. at 1242; *Francis*, 471 U.S. at 316-17, 105 S.Ct. at 1973-74; *Sandstrom v. Montana*, 442 U.S. 510, 520-22, 99 S.Ct. 2450, 2457-58 (1979). A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due process rights. *See Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419, 2420 (1989) (per curiam); *Rock*, 959 F.2d at

1245-46; *see also Polsky v. Patton*, 890 F.2d 647, 651 (3d Cir. 1989) (no due process violation where jury instruction "did not omit any essential element of the crime charged").

This result is not inconsistent with *Johnson*, 1997 WL 318064 at *6-8. In that case, the federal habeas petitioner contended that the jury instructions concerning justification rendered at his Pennsylvania trial for aggravated assault, and later affirmed by an intermediate appellate court, violated his rights pursuant to the Due Process Clause. *See id.* at *3-5. We noted that a conviction for aggravated assault in Pennsylvania required that the Commonwealth prove beyond a reasonable doubt that the defendant acted with malice. *See id.* at *6. We further noted that justification on the part of the defendant would necessarily negate a showing of malice. *See id.* Thus, the Commonwealth was required to prove that the defendant acted without justification. *See id.* The petitioner argued that, by misdescribing justification pursuant to Pennsylvania law, the trial court violated his Due Process rights. *See id.* He reasoned that the allegedly erroneous instruction allowed the Commonwealth to convict him of the offense without having proved every element, as properly defined, beyond a reasonable doubt. *See id.*

We rejected this argument, holding that no federal issue was raised. *See id.* at *8. We further held that a federal habeas court is bound by the definition given a state criminal offense even by intermediate state appellate courts. *See id.* at *10-13. However, in *Johnson* the Pennsylvania Supreme Court had not yet defined justification pursuant to state law. *See id.* at *4. The petitioner simply challenged the definition of that term rendered by the state trial and intermediate appellate courts, urging that the Pennsylvania Supreme Court would rule differently. Thus,

Johnson stands for the unremarkable proposition that the states are free to define criminal offenses in any way they see fit, within certain constitutional limitations, even through their lower courts. This is so even if the definition they choose makes it somewhat easier to convict a person of the offense than would be the case under a different definition. *Johnson* most emphatically does not stand for the proposition that, once a state has defined a criminal offense, the state may then proceed to convict a person of that offense on anything less than proof beyond a reasonable doubt of all the elements of the offense. Thus, whether a state is relieved of that burden via an instruction that omits an element of an offense, materially misdescribes that element, or shifts to the defendant the burden of proof on that element, the result is the same — the defendant has been denied his federal constitutional rights.

The dissent accuses us of holding that "the Due Process Clause is violated whenever a state trial judge, in instructing a jury on an element of a state offense, gives an ambiguous instruction that prejudices the defendant." Dissent slip op. at 45-46. We do no such thing. First, rather than being "ambiguous," the language must be such that "there is a reasonable likelihood that the jury has" understood and applied it in a certain way. *Supra* at 18 (emphasis and internal quotation marks omitted). Second, we require more than that the defendant simply be "prejudice[d]." Our recent holding in *Johnson*, 1997 WL 318064 at *6-8, makes this clear. The standard requires that the defendant be prejudiced in a very particular way — it requires that the erroneous instructions have operated to lift the burden of proof on an essential element of an offense as defined by state law.

The dissent notes that the Supreme Court has never expressly held that a jury charge that eases the state's burden of

proof on an element of an offense by omitting or materially misdescribing it violates the Due Process Clause. The proposition is true as far as it goes. If our duty as a court of appeals were simply to sustain only those claims the legal bases for which have already been settled by the Supreme Court, the dissent's observation would have some relevance. However, our duty also extends to predicting, in circumstances where there is no specific guidance, how that Court would decide if it were to consider the case before us.

Contrary to the dissent's assertions, our holding follows inexorably from the Supreme Court's decisions in *Sandstrom*, *Franklin*, and *Carella*. As the dissent recognizes, those cases "held that the Due Process Clause [i]s violated where jury instructions in [a] criminal case[] set out either a conclusive presumption or a mandatory rebuttable presumption that relieve[s] the prosecution of the burden of persuasion on the presumed fact." Dissent slip op. at 46. Here, the jury was not instructed on an essential element of first-degree murder — Smith's intent. Instead, as we read the charge (and we understand the dissent disputes this point) the jury was instructed that as long as either Smith or Alston killed Sharp, and as long as Smith and Alston were accomplices in the robbery, Smith could be found guilty of first-degree murder. This charge was the functional equivalent of an instruction that as long as either Smith or Alston killed Sharp, and as long as Smith and Alston were accomplices in the robbery, *the jury should conclusively presume that Smith had the intent to kill Sharp*, and therefore he could be found guilty of first-degree murder. Yet the dissent apparently would find that the former charge does not violate Smith's constitutional rights, because it is not identical in form to the latter, which indisputably is repugnant to the Due Process Clause under *Sandstrom*, *Franklin*, and *Carella*.

In this case, there is no dispute that Pennsylvania law requires the Commonwealth prove specific intent to kill on the part of the defendant in order to convict him of first-degree murder. The Commonwealth unambiguously conceded as much at oral argument. However, the jury was instructed that Smith could be found guilty of first-degree murder even if it did not find beyond a reasonable doubt that Smith intended for a killing to take place. The instruction thus relieved the Commonwealth of the burden of proving beyond a reasonable doubt facts necessary to constitute every element of the offense with which Smith was charged. The instruction therefore constituted error pursuant to the Due Process Clause of the Fourteenth Amendment.

D.

Finally, we must determine whether the constitutional error that occurred in this case was harmless.

1.

We must first determine whether a jury charge that omits or misdescribes an element of an offense can *ever* be harmless. We have explained that

> [c]onstitutional errors have been categorized as one of two types: structural error or trial error. A structural error is a defect in the trial mechanism itself, affecting the entire trial process, and is *per se* prejudicial. Trial error occurs during the presentation of the case to the jury, and may be qualitatively assessed in the context of all other evidence. Thus, trial errors are subject to a harmless error analysis.

Yohn v. Love, 76 F.3d 508, 522 (3d Cir. 1996) (citations omitted); *see also Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 1264-65 (1991).[5]

In *California v. Roy*, __ U.S. __, __, 117 S.Ct. 337, 339 (1996) (per curiam), the Supreme Court characterized "an error in the instruction that defined the crime" as a trial error rather than a structural error. In that case, the defendant was accused of aiding a confederate in committing first-degree murder. *See id.* at __, 117 S.Ct. at 337. The trial court had instructed the jury the defendant could be convicted if it found beyond a reasonable doubt that he had knowledge of his cohort's unlawful purpose and that the defendant aided him in the commission of the act. *See id.* at __, 117 S.Ct. at 337-38. The instruction was erroneous under state law because it failed to convey the critical idea that the defendant must also have *intended* to aid in the commission of the crime in order to be found guilty. *See id.* at __, 117 S.Ct. at 338.

The *Roy* Court arguably did not decide that all "error[s] in the instruction that define[] the crime" constitute trial error, *id.* at __, 117 U.S. at 339, but only that that label attaches "to errors that concern fairly narrow departures from proper charge language." *Peck v. United States*, 102 F.3d 1319, 1325 (2d Cir. 1996) (en banc) (per curiam) (Newman, C.J., concurring); *see*

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5. In *Kontakis v. Beyer*, 19 F.3d 110, 116 (3d Cir. 1994), we stated broadly that "unconstitutional jury instructions" constitute trial error. There is at least one type of erroneous jury instruction, however, that constitutes structural error. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80, 113 S.Ct. 2078, 2082 (1993) (defective reasonable doubt charge). While most erroneous jury instructions that rise to the level of constitutional error will be trial error, we undertake to determine how to classify the specific type of instructional error that occurred here.

also id. at 1326 (Newman, C.J., concurring). It may be that a "mere" misstatement of an element of an offense is a trial error, while a complete omission of an element is a structural error. *See Roy*, __ U.S. at __, 117 S.Ct. at 339; *see also Waldemer v. United States*, 106 F.3d 729, 736 n.3 (7th Cir. 1997); *United States v. Wiles*, 102 F.3d 1043, 1059 (10th Cir. 1996) (en banc), *modified*, 106 F.3d 1516 (10th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3632 (U.S. Mar. 10, 1997) (No. 96-1430); *cf. Peck*, 102 F.3d at 1325 (Newman, C.J., concurring).

However, we need not decide this issue. The charge error in the instant case is so similar to the one at issue in *Roy* that we believe that this case is controlled by that decision. In addition, several pre-*Roy* decisions from both the Supreme Court and this Court all hold that similar types of instructional error constitute trial error. *See Yates v. Evatt*, 500 U.S. 391, 402, 111 S.Ct. 1884, 1892 (1991) (instructions that impermissible impose mandatory, rebuttable presumption on element of offense); *Carella*, 491 U.S. at 266, 109 S.Ct. at 2421 (mandatory, conclusive presumptions); *Rose v. Clark*, 478 U.S. 570, 579-82, 106 S.Ct. 3101, 3106-08 (1986) (mandatory, rebuttable presumption); *Pope v. Illinois*, 481 U.S. 497, 501-03, 107 S.Ct. 1918, 1921-22 (1987) (instructions that misdescribe element of offense in violation of First and Fourteenth Amendments); *United States v. Edmonds*, 80 F.3d 810, 824 (3d Cir. 1996) (en banc) (instructions that effectively abridge federal criminal defendant's Sixth Amendment right to jury unanimity); *Kontakis*, 19 F.3d at 116 (instructions that alter burden of proof on element of offense). We conclude that the error that occurred here was trial error, not structural error.

2.

In a collateral proceeding, the standard for harmlessness is

"whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Roy*, __ U.S. at __, 117 S.Ct. at 338 (internal quotation marks omitted); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722 (1993); *Yohn*, 76 F.3d at 523; *Alston v. Redman*, 34 F.3d 1237, 1252 (3d Cir. 1994).

Pursuant to the *Brecht* standard,

> [t]he crucial inquiry is the impact of the error on the minds of the jurors in the total setting. It is thus inappropriate to ask whether there was sufficient evidence to support the result, apart from the phase of the trial affected by the error. The correct inquiry is whether the error had a substantial influence on the verdict despite sufficient evidence to support the result apart from the error.

Yohn, 76 F.3d at 523 (citations omitted); *see also Alston*, 34 F.3d at 1252.

The Supreme Court has held that if a habeas court "is in grave doubt as to the harmlessness of an error," habeas relief must be granted. *O'Neal v. McAninch*, 513 U.S. 432, __, 115 S.Ct. 992, 995 (1995). Thus, if the court concludes from the record that the error had a "substantial and injurious effect or influence" on the verdict, or if it is in "wave doubt" whether that is so, the error cannot be deemed harmless. *See Roy*, __ U.S. at __, 117 S.Ct. at 338.

3.

We now apply the harmless error analysis set forth above

to the facts of this case. The Commonwealth urges that this error was harmless because the jury's findings, in light of the evidence, embrace the finding that Smith actually killed Sharp and intended to do so. According to the Commonwealth, the harmlessness of the error follows syllogistically: (1) the trial court essentially instructed the jury that Smith was guilty of first-degree murder if at least one of the robbers both killed Sharp and intended to kill him; (2) by finding Smith guilty of first-degree murder, the jury necessarily found beyond a reasonable doubt that either Smith or Alston killed Sharp and intended to do so; and (3) because there was evidence that Smith killed Sharp, and no evidence that Alston killed Sharp, the jury found beyond a reasonable doubt that Smith both killed Sharp and intended to do so.

While this reasoning has some superficial appeal, it does not withstand close scrutiny. The fundamental flaw arises in the leap from step two to step three of the analysis. The jury was never asked to evaluate the respective probabilities that Smith or Alston killed Sharp. The verdict demonstrates that the jury found beyond a reasonable doubt that *one* of them killed Sharp. The evidence supporting this verdict demonstrates that it is *more likely* that Smith, rather than Alston, killed Sharp. However, this evidence and the factual findings it supports are not the " 'functional[ ] equivalent' " of, nor do they "effectively embrace[ ]," a finding *beyond a reasonable doubt* that Smith killed Sharp. *Edmonds*, 80 F.3d at 824 (quoting *Carella*, 491 U.S. at 271, 109 S.Ct. 2423-24 (Scalia, J., concurring in the judgment)), *cert. denied*, __ U.S. __, 117 S.Ct. 295 (1996) (alteration added); *Roy*, __U.S. at __, 117 S.Ct. at 339 (Scalia, J., concurring). We cannot say that a finding that either Smith or Alston killed Sharp is " 'so closely related' " to a finding that Smith killed Sharp, in light of the evidence presented, that

" 'no rational jury' " that made the former finding would have failed to make the latter finding. *Edmonds*, 80 F.3d at 824 (quoting *Carella*, 491 U.S. at 271, 109 S.Ct. at 2423-24 (Scalia, J., concurring in the judgment)).

The strongest evidence that Smith actually killed Sharp were his admissions, made immediately after the robbery, related at trial by Barrow and Yancey. These two witnesses were admitted accomplices to the robbery whose credibility was therefore in question. Smith's participation in the robbery was well established by independent evidence — the jury did not need to believe either Barrow or Yancey in order to find him guilty of robbery and therefore (because of the erroneous jury instructions) first-degree murder. It is thus unclear whether and to what extent the jury believed or disbelieved Barrow and Yancey. Since the jury charge did not necessitate that the jury make this determination, we can only speculate as to its conclusion with regard to Barrow and Yancey's credibility. We cannot assume that the jury, having found Smith guilty, "believed all properly admitted evidence against him and disbelieved all evidence in his favor." Roger J. Traynor, The Riddle of Harmless Error 28 (1970).

The situation here is analogous to the one contemplated in *Yates*, 500 U.S. at 405-06, 111 S.Ct. at 1894. In that "mandatory rebuttable presumption" case, the Supreme Court cautioned that if it appears that the jury did not consider

> all the evidence bearing on the issue in question[,] before it made the findings on which the verdict rested . . . an examination of the entire record would not permit any sound conclusion to be drawn about the significance of the error to the jury in reaching the

> verdict. . . . [T]he terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.

Id. (footnote omitted). Analogously, the effect of the instructions here was to "so narrow the jury's focus as to leave it questionable that a reasonable juror would" endeavor to answer the rather difficult question whether Smith killed Sharp, rather than to rest upon the answers to the relatively straightforward questions whether Smith participated in the robbery and whether either Smith or Alston killed Sharp.

Moreover, the Commonwealth proceeded on the theory that Smith was guilty of first-degree murder whether or not he intended the victim to be killed. Although the prosecutor in summation contended that Smith committed the killing, he also repeatedly admonished the jury that it need not consider whether Smith actually killed Sharp. *See* Cross App. at 1007-08, 1010, 1012-13, 1014, 1017. Having repeatedly urged the jury to base its verdict on a theory predicated on a fundamental constitutional error, the Commonwealth cannot now seriously contend that that error had no "substantial and injurious effect or influence" on the verdict. *See Yohn*, 76 F.3d at 523-24 (repeated emphasis by prosecution on importance of erroneously admitted evidence demonstrated error was not harmless).

For these reasons, our harmless-error analysis leads inexorably to the conclusion that the error here was not harmless. Upon a review of the record, we cannot say that the error had no "substantial and injurious effect or influence" on the jury's verdict.

Appendix A

IV.

The judgment of the district court will be reversed to the extent that it denied Smith habeas relief with regard to his conviction for first-degree murder. The judgment will be vacated in all other respects. The matter will be remanded to the district court with directions that it conditionally order Smith released from confinement. Smith shall be released unless the Commonwealth retries him for the crime of first-degree murder within 180 days.[6]

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6. We express no opinion whether, following the grant of habeas relief, the Commonwealth may properly move to resentence Smith for any lesser included homicide (such as murder or manslaughter where specific intent is not an element of the crime). Nor do we express an opinion concerning the propriety of the Commonwealth moving to resentence Smith on the other crimes for which he was convicted along with first-degree murder.

Appendix A

ALITO, *Circuit Judge*, dissenting.

The majority's decision in this case is troubling. In 1983, Clifford Smith was convicted in state court for first-degree murder. At his trial, the prosecution introduced strong evidence that Smith and another man, Roland Alston, robbed a pharmacy and that, after the pharmacist was ordered to lie face down on the floor, Smith proceeded to execute him with a gunshot to the head. Fourteen years later, when retrial will almost certainly be difficult at best, the majority holds that Smith's federal habeas petition must be granted based on a perceived ambiguity in the jury instructions. According to the majority, certain references to the concept of an "accomplice" are ambiguous in that they could be interpreted to mean either " 'accomplice in the killing,' 'accomplice in the robbery,' or both." Maj. Op. at 20-21. This supposed ambiguity, the majority concludes, not only created confusion about the requirements of state law but rose to the level of a federal due process violation. **The majority takes this course even though (1) the trial judge, before making the references to "accomplice" that the majority finds to be ambiguous, provided an accurate and detailed definition of that term which, if read into all of the challenged references, renders them accurate; (2) Smith's attorney did not object at trial to the relevant portions of the jury charge; and (3) Smith never argued in either of his two appeals to the Pennsylvania Supreme Court that these portions of the jury instructions violated either state law or the Due Process Clause.** Under these circumstances, I cannot agree with the majority's decision.

I.

An important threshold question is whether Smith exhausted

state remedies. Although the Commonwealth has not raised this issue, I believe that we should nevertheless address it under the circumstances present here.[1] In *Granberry v. Greer*, 481 U.S. 129, 134-35 (1987), the Supreme Court stated that "both comity and judicial efficiency" might make it appropriate for a court to raise the issue of exhaustion on its own where a case "presents an issue on which an unresolved question of fact or of state law might have an important bearing." 481 U.S. at 134-35. The present case falls squarely within this description. As noted, the majority's decision is founded upon its conclusion that the jury instructions inaccurately explained Pennsylvania's rule of accomplice liability. Before considering whether this purported misstatement of state law rose to the level of a federal due process violation, it would be helpful to have the benefit of a decision by the Pennsylvania courts on the underlying issue of state law.

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1. In this opinion, I rely on the caselaw regarding exhaustion and procedural default as they existed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1221, which became law on April 24, 1996, after Smith's federal habeas petition was filed. Under a provision of that Act applicable to a state prisoner under a capital sentence, a district court is generally precluded from considering a claim unless it was "raised and decided on the merits in the State courts." 28 U.S.C. §2264(a). This provision applies to federal habeas petitions already pending when the Act became law. *See Lindh v. Murphy*, 1997 WL 338568 (U.S. Sup. Ct. June 23, 1997). However, this provision applies only if a state satisfies certain conditions, *see* U.S.C. §2261, and in *Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35, 36 (3d Cir. 1997), the Commonwealth declared, and our court agreed, that Pennsylvania did not meet the requirements of §2261 as of January 31, 1997. It therefore appears that §2264(a) is inapplicable here. Under the current version of 28 U.S.C. §2254(b)(3), consideration of the issue of exhaustion would be required. However, Smith's petition was filed before this provision took effect. *See Lindh, supra.*

We have no such decision, however, because Smith did not challenge the relevant portions of the jury instructions *on any ground* in either of his two appeals to the Pennsylvania Supreme Court. Not only did he fail to raise the federal due process claim on which the majority's decision rests, but he did not even contend that the instructions misstated state law.[2]

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2. On direct appeal, Smith argued that the trial judge erred in refusing to give three instructions requested by the defense, namely Nos. 8, 11, and 12. Number 8 defined first degree murder; number 11 defined involuntary manslaughter; and number 12 defined the terms "intentionally," "knowingly," "recklessly," and "negligently." None of these requested instructions related to the claim on which the majority relies.

The Supreme Court of Pennsylvania rejected Smith's argument regarding the requested instructions on involuntary manslaughter on the ground that the evidence at trial did not support such a charge. *Commonwealth v. Smith*, 513 A.2d 1371, 1377-78 (Pa. 1986). The court rejected Smith's argument concerning the other two requested instructions on the ground that the substance of those requests was adequately covered by the trial judge. The state supreme court wrote:

> It is established that a trial court is not required to accept points submitted by counsel verbatim, but rather is free to select its own forms of expression. *Commonwealth v. McComb*, 462 Pa. 504, 509, 341 A.2d 496, 498 (1975). "The only issue is whether the area is adequately, accurately and clearly presented to the jury for their consideration." *Id.* We have reviewed the record in the present case and find no inadequacies in the trial court's instructions as to elements of the crime of murder of the first degree and as to pertinent requirements of criminal culpability.

513 A.2d at 1377.

This passage cannot reasonably be interpreted to mean that the state

(Cont'd)

Although Smith did not exhaust state remedies, "[a] petitioner's failure to exhaust state remedies is . . . excused . . . when state law 'clearly foreclose[s] state court review of [the] unexhausted claims.' " *Doctor v. Walters*, 96 F.3d 675, 680 (3d Cir. 1996) (quoting *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993)). Here, the Pennsylvania courts might well hold that review of Smith's claim is foreclosed under the Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. S. §§9541-46 (Supp. 1996). In *Doctor*, 96 F.3d at 681, we explained that under Pennsylvania law

> "[a]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." [42 Pa. Cons. Stat. Ann.] §9544(b). As the Pennsylvania courts have noted, "nearly all claims are waived under the PCRA since nearly all claims potentially could have been raised on direct appeal . . . . *Commonwealth v. Eaddy*, 419 Pa. Super. 48, 614 A.2d 1203, 1207-08 (1992), appeal denied, 534 Pa. 636, 626 A.2d 1155 (1993); *accord Commonwealth v. Stark*, 442 Pa. Super. 127, 658 A.2d 816, 820 (1995).

We recognized, however, that PCRA review might not be foreclosed if a petitioner is "able to demonstrate a 'miscarriage of justice' warranting 'departure from the PCRA's stringent

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(Cont'd)

supreme court *sua sponte* considered the federal due process claim now before us. Indeed, it would be utterly unrealistic to interpret the court's statements to mean even that it had rejected all possible objections to the instructions that might be raised under state law. To go further and read that statement as a rejection of an unraised federal due process claim would be absurd.

eligibility requirements.' " *Doctor*, 96 F.3d at 681 (quoting *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185, 1193 (1995) (Hoffman, J., concurring) (citations omitted), appeal denied, 675 A.2d 1243 (1996)). I question whether at this time the Pennsylvania courts would entertain Smith's challenge to the jury instructions, but I would certainly request briefing from the parties on this question.

If, as seems likely, PCRA review is foreclosed because of Smith's failure to raise his federal due process claim in the prior state-court proceedings, we should consider the doctrine of procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.* (1991). This doctrine, like exhaustion, has not been raised by the Commonwealth, but I believe that we should apply this doctrine nevertheless. Our court, *see Hull v. Freeman*, 932 F.2d 159, 164 n.4 (3d Cir. 1991), and many others have held that procedural default may be raised *sua sponte* by a court of appeals. *See, e.g., Ortiz v. Dubois*, 19 F.3d 708, 714 (1st Cir. 1994); *Washington v. James*, 996 F.2d 1442 (2d Cir. 1993); *Hardiman v. Reynolds*, 971 F.2d 500, 502-04 & n.4 (10th Cir. 1992).[3] In *Washington*, the Second Circuit explained that

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3. *Cf. Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (non-jurisdictional *Teague* rule may but need not be raised by federal court *sua sponte*; *Granberry*, 481 U.S. at 134-35 (same for exhaustion); *Patsy v. Board of Regents of Fla.*, 457 U.S. 498, 515 n. 19 (1982) (same for Eleventh Amendment defense). *Compare Trest v. Cain*, 94 F.3d 1005 (5th Cir. 1996), petition for cert. granted, 117 S.Ct. 1842 (1997) (presenting question whether court of appeals is required to raise procedural default). The petition in *Trest* argues that, under *Gray v. Netherland*, 116 S.Ct. 2080, 2082 (1996), procedural default is an affirmative defense that is lost if not properly raised by the state. But while it is certainly true that a state may lose the "right" to have the doctrine of procedural default considered if it does not properly raise that issue, *see Gray*, 116 S.Ct. at 2082, it is far from clear that *Gray* meant to go further and say that the

(Cont'd)

"[p]rinciples of comity and federalism bear on the relations between court systems, and those relations will be affected whether or not the litigants have raised the issue themselves." 996 F.2d at 1448. In *Hardiman*, the Tenth Circuit, quoting our opinion in *Brown v. Fauver*, 819 F.2d 395, 398 (3d Cir. 1987) (holding that a court could raise exhaustion *sua sponte*), stated that it was appropriate for a court to raise the issue of procedural default because it implicates " 'values that may transcend the concerns of the parties to [the] action.' " 971 F.2d at 502.

In *Ortiz*, the First Circuit, when confronted with a federal constitutional claim closely resembling Smith's, held that it was appropriate to raise the issue of procedural default on its own motion. The petitioner in *Ortiz*, argued that "his right to due process was violated because the jury was not properly instructed on the elements of felony-murder under Massachusetts law, and therefore did not find every element of the offense beyond a reasonable doubt." 19 F.3d at 710. Although the petitioner argued on direct appeal that the instructions were deficient, the Supreme Judicial Court of Massachusetts declined to review his claim on the merits because he had not objected to the instructions at trial. *Id.* at 713. Instead, the Supreme Judicial Court "limited its inquiry to whether the error gave rise to a substantial likelihood of miscarriage of justice." *Id.* at 714. Accordingly, the First Circuit found that "the state procedural default [was] clear on

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(Cont'd)

lower federal courts lack the discretion to raise the issue on their own. *See id.* (citing *Schiro v. Farley*, 510 U.S. 222, 227-28 (1994) (refusing as a matter of discretion to consider *Teague* bar where not raised at cert. petition stage), and *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) (refusing to consider procedural default where raised for the first time in Supreme Court).

the face of the record," and thus found it unnecessary to review the merits of the petitioner's claim.[4]

Like the First Circuit in *Ortiz*, I think that it is appropriate for us to raise the issue of procedural default in this case on our own motion, particularly since Smith's federal constitutional claim is grounded on an issue of state law. Since Smith has not had an opportunity to address the issue of procedural default, I would request further briefing on that issue before determining whether there is any basis for excusing default in this case.

The majority refuses to consider the issues of exhaustion and procedural default — indeed, refuses even to request briefing on these serious issues. The majority voices concern that consideration of these issues would "result in undue delay." Maj. Op. 13; *see also id.* at 12. This concern is curious — and not only because of the pace of the post-conviction proceedings to date. Consideration of procedural default would not simply delay a decision on the merits of Smith's claim; rather, it holds the potential for precluding a decision on the merits of that claim. *If* the claim is procedurally defaulted, *if* Smith cannot show cause and prejudice, and *if* no other exception applies (questions on which I express no view without hearing from the parties), then neither the state nor the federal courts would decide the merits of Smith's claim. Obviously, then, the refusal to consider procedural default cannot be defended on the ground that to do so would only delay an inevitable decision on the merits.

The majority also contends that the jury instructions resulted in a "miscarriage of justice." As I show below, however, the instructions at issue here were at most ambiguous — and that is

4. The First Circuit did state that it would have rejected the claim even if it had reached the merits.

undoubtedly why they did not even elicit an objection from Smith's trial counsel, why challenges to these instructions were not included among the numerous arguments raised in Smith's two appeals to the Supreme Court of Pennsylvania, and why the district court judge in this federal habeas corpus proceeding thought that the alleged errors that the majority is willing to label "a miscarriage of justice" were meritless and did not even warrant discussion. *See Smith v. Horn*, 1996 WL 172047 (E.D. Pa. 1996), page 12.

There is one reasonable argument that can be made in support of the conclusion that we should not raise the doctrines of exhaustion and procedural default on our own, i.e., that these doctrines, which serve to protect state prerogatives, should be raised by the state's attorneys. But, as I previously noted, our court and others have recognized that the values served by these doctrines "may transcend the concerns of the parties to an action." *Brown v. Fauver*, 819 F.2d at 398.

Aiming to curb federal habeas corpus abuses, particularly in death penalty cases, Congress endorsed this view when it enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1221. In capital cases subject to chapter 154, 28 U.S.C. §§2261-66, Congress prohibited federal courts from considering a claim unless it was "raised and decided on the merits in the State courts." 28 U.S.C. §2264(a). In other cases, Congress provided that a state may not be deemed to have waived exhaustion unless it does so expressly. 28 U.S.C. §2254(b)(3). These new provisions do not apply here *(see* footnote 1, *supra*), but they are animated by the same respect for the state court systems that informed our court's prior decisions. Accordingly, I believe that we should not proceed to review the merits of Smith's due process claim

without considering the issues of exhaustion and procedural default. However, since the majority has skipped over these questions and plunged into the merits of Smith's federal constitutional claim, I will address the merits of that claim as well.

II.

A. The Pennsylvania rule of accomplice liability is as follows:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense *if he acts with the kind of culpability, if any, with respect to that result that it is sufficient for the commission of the offense.*

18 Pa. Cons. Stat. Ann. §306(d) (emphasis added). An "accomplice" is defined in pertinent part as follows:

> A person is an accomplice of another person in the commission of an offense if:
>
> (1) *with the intent of promoting or facilitating the commission of the offense,* he:
>
> (i) solicits such other person to commit it; or
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it.

18 Pa. Cons. Stat. Ann. §306(c) (emphasis added). Thus, in order for an "accomplice" to be criminally responsible for a particular offense, the "accomplice" must have "the intent of promoting or facilitating the offense" — which means that the accomplice must at a minimum possess the intent necessary for conviction of that offense as a principal.

In this case, Smith was charged with first degree murder, robbery, possession of instruments of crime, and conspiracy. The trial judge instructed the jury on the elements of all of these offenses, as well as the lesser included homicide offenses of second and third degree murder and voluntary manslaughter.

Before setting out the elements of these offenses, however, the trial judge instructed the jury on the principles of accomplice liability, which were relevant, not only to the first degree murder charge, but to all of the other substantive offenses as well. The trial judge accurately stated that an accomplice is criminally responsible for the acts of the principal. CA 1028. "Therefore," the court stated, "it is necessary that you understand and that we spell out what is meant under our Crimes Code by the term accomplice." *See* CA 1028-29. Tracking the language of 18 Pa. Cons. Stat. Ann. §306(c)(1), the trial judge then explained that a person is an accomplice "*if with the intent of promoting or facilitating the commission of a crime* he solicits, commands, encourages or requests the other person or persons to commit *that crime or crimes,* or aids, agrees to aid, or attempts to aid the other person in the planning or committing *the crime.*" *Id.* (emphasis added). Under this instruction, as under 18 Pa. Cons. Stat. Ann. §306(c), a person can be an accomplice with respect to the commission of a particular crime only if that person has "the intent of promoting or facilitating" the commission of "that crime."

Appendix A

When a trial judge, in instructing a jury, provides a definition of a complicated legal term, the judge is not generally required to repeat that definition every time the term is subsequently employed. Rather, the judge may reasonably rely on the prior definition, and that is what the trial judge did here — without objection. If the previously provided definition is read into the instructions whenever the judge referred to an "accomplice," the judge's instructions are correct. Under this procedure, every reference to "an accomplice" should be read as a reference to an "accomplice" with respect to the particular offense or offenses that the judge is discussing. In finding that certain references to the concept of an "accomplice" are ambiguous, the majority ignores the significance of the definition that preceded these references.

For example, the majority holds (Maj. Op. 18-19) that the trial judge violated due process when he gave the following instruction:

> [T]he elements of first degree murder are the unlawful killing of another person done intentionally; that is, willfully, deliberately and with premeditation, plus malice, as I will define that term to you. If these elements are established beyond a reasonable doubt, you may, on the theory that one was the perpetrator and the other the accomplice, find Clifford Smith guilty of murder in the first degree. . . .

CA 1035. The majority finds this instruction objectionable because it did not clearly convey the message that, if Alston pulled the trigger, Smith could be convicted of first degree murder only if Smith was Alston's " 'accomplice in the killing' and not simply [his] accomplice in the robbery.' " Maj. Op. 19. But if the previously supplied definition of an "accomplice" is

applied, this alleged ambiguity is dispelled. As noted, an "accomplice" must have the intent required for the offense in question (*see* Pa. Cons. Stat. Ann. §306(c); CA 1029); therefore, to be an accomplice in a first degree murder a person must have the intent required for that offense, i.e., the person must act intentionally, willfully, deliberately, and with premeditation. 18 Pa. Cons. Stat. Ann. §§2502(a), (d).

To be sure, *if* Smith's trial attorney had objected to this and the other instructions at issue on the ground that they were suspectable to the misinterpretation that troubles the majority, *if* the trial judge had overruled this objection, *if* the objection had been raised on direct appeal, and *if* we sat on a Pennsylvania appellate court, rather than a federal court, I could understand a decision requiring a new trial. But for a federal appeals court to order a new trial 14 years later based on such a previously unchallenged ambiguity is shocking.

The remaining portions of the instructions that the majority has singled out are similar. The majority objects (Maj. Op. 19-20) to certain instructions in which the trial judge attempted to explain in generic terms the application of the principles of accomplice liability to any of the homicide offenses that were before the jury, i.e., first, second, and third degree murder and voluntary manslaughter. *See* CA 1030-32. Probably because he was speaking about all of these offenses at the same time, the judge did not at this point specify the intent required for conviction for each offense (he did that a few pages later), but if the definition of an accomplice that he gave on the previous page is applied, the challenged instructions were correct. In retrospect, one might argue that it was inadvisable for the trial judge to have attempted to explain in one breath how the principles of accomplice liability relate to all four of the homicide offenses that were before the jury, and one might fault

the particular language that the judge chose. But I see nothing in these instructions that justifies federal habeas relief.[5]

Having identified what is at most an ambiguity in the jury instructions on a point of state law, the majority alchemizes this ambiguity into a violation of the Due Process Clause. The majority writes:

> In this case, the misapplication of state law resulted in a federal constitutional error. It is well-settled that "the Due Process Clause [of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970); *see also Victor, [v. Nebraska*, 511 U.S. 1, — (1994), 511 U.S. 114 S.Ct. — 1242 (19); *Francis*, 471 U.S. at 317, 105 S.Ct. at 1973; *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S.Ct. 2450, 2458 (1979). A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation

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5. The majority goes so far as to cite alleged ambiguities in the instructions on criminal conspiracy as support for its decision to strike down Smith's first degree murder conviction. *See* Maj. Op. 18-19; CA 1047-48. This argument is far-fetched indeed. By this point in the instructions, the trial judge had turned to the last "remaining crimes in the Information. . . . the crimes of criminal conspiracy to commit the various robberies . . . criminal conspiracy to commit first degree murder and murder and criminal conspiracy to commit the act of possession of instruments of crime." CA. 1043. If there were any serious flaws in these instructions — and I see none — they could at most undermine Smith's conspiracy conviction, not his conviction for first degree murder.

> to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due process rights. *See Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419, 2420 (1989) (per curiam); *Rock*, 959 F.2d at 1245-46; *see also Polsky v. Patton*, 890 F.2d 647, 651 (3d Cir. 1989) (no due process violation where jury instruction "did not omit any essential element of the crime charged").

Maj. Op. at 25.

In essence, the majority holds that the Due Process Clause is violated whenever a state judge, in instructing a jury on an element of a state offense, gives an ambiguous instruction that prejudices the defendant — even if defense counsel does not object. None of the decisions cited by the majority supports this holding. In *Winship*, the Supreme Court held that the Due Process Clause requires proof beyond a reasonable doubt to support a finding that a juvenile committed an act that would constitute a crime if committed by an adult. *Sandstrom*, *Francis*, and *Carella* all held that the Due Process Clause was violated where jury instructions in criminal cases set out either a conclusive presumption or a mandatory rebuttable presumption that relieved the prosecution of the burden of persuasion on the presumed fact. *Victor* reviewed instructions that defined the concept of reasonable doubt. No Supreme Court case cited by the majority — or any other Supreme Court decision of which I am aware — has held that the Due Process Clause is violated whenever a state trial judge, in instructing a jury on the elements of a state offense, uses ambiguous language that prejudices the defendant. Nor is the majority's decision supported by either of the Third Circuit cases it cites. In *Rock*, 959 F.2d at 1245-46, we merely restated in dicta the holdings of *Winship* and *Sandstrom*. In

Polsky, we held that a particular instruction conveyed the essence of the element that was allegedly omitted. 890 F.2d at 651.

Although not cited by the majority, the Supreme Court opinion that appears to be most closely on point, *Henderson v. Kibbe*, 431 U.S. 145 (1977), cuts against the majority's argument. In *Henderson*, a federal court of appeals, relying on *Winship*, ordered that federal habeas corpus relief be granted because the trial judge (without objection) failed to instruct the jury on an essential element of the offense of second-degree murder. Reversing, the Supreme Court wrote:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.
>
> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Capp v. Naughten*, 414 U.S. at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,' " *id.* at 146.

431 U.S. at 154 (footnotes omitted).

Here, the instructions cited by the majority did not " 'so infect[] the entire trial that the resulting conviction violates due process.' " *Id.* (citation omitted). Thus, I would reject Smith's due process claim.

It is a cardinal principle that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 112 S.Ct. 475, 480 (1991). Our court has emphasized this important rule. *Geschwendt v. Ryan,* 967 F.2d 877, 888-89 (3d Cir. 1992) (en banc); *Zettlemoyer v. Fulcomer,* 923 F.2d 284, 309 (3rd Cir. 1991). Cf. *Johnson v. Rosemeyer,* 1997 WL 318064, (3d Cir. June 13, 1997). The majority's extension of *Winship* and related precedents threatens to undermine this important principle and to claim for a federal habeas court the power to decide, long after a state trial has been completed, whether previously unchallenged jury instructions set out the requirements of state law with sufficient clarity to satisfy the federal court's taste. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106 (1984). The majority's decision here not only works an injustice in an important case but it creates a dangerous precedent. I must therefore dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 95-3671

CLIFFORD SMITH

v.

MARTIN HORN, et al.

MEMORANDUM

Bartle, J. February 22, 1996

This is a habeas corpus proceeding, under 28 U S.C. § 2254,[1] in which petitioner Clifford Smith ("Smith") challenges the constitutionality of his murder trial and death sentence. Smith has exhausted his state remedies.

I.

In 1983, Smith, along with an accomplice, robbed an

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1. Title 28 U.S.C. § 2254(a) states: "... a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

apothecary in Bristol, Pennsylvania. During the course of the crime, Smith put his gun to the pharmacist's head while the latter was lying quietly on the floor and pulled the trigger. The shot proved fatal. A jury in the Court of Common Pleas of Bucks County convicted Smith of first degree murder. It then imposed the death penalty. After the denial of post trial motions, the Pennsylvania Supreme Court affirmed his conviction and death sentence, and the United States Supreme Court denied certiorari. *Commonwealth v. Smith*, 513 A.2d 1371 (Pa. 1986), *cert. denied*, 480 U.S. 951 (1987). Nothing happened thereafter for about three years until Governor Robert P. Casey signed Smith's death warrant in 1990. As a result, Smith sought post-conviction relief in the Court of Common Pleas of Bucks County. His execution was stayed pending the resolution of the petition. Following a hearing, the state court denied him relief. The Pennsylvania Supreme Court affirmed. *Commonwealth v. Smith*, 650 A.2d 863 (Pa. 1994). The United States Supreme Court again denied his petition for certiorari. *Smith v. Pennsylvania*, __ U.S. __, 115 S. Ct. 1799 (1995). Governor Thomas Ridge, Governor Casey's successor, signed Smith's second death warrant in May, 1995.

After his execution was scheduled for July 11, 1995 at the State Correctional Institution at Rockview, Smith for the first time sought relief in the federal court. On June 30, 1995, pursuant to Smith's motion and after a hearing, this court stayed his execution. We allowed him to proceed in forma pauperis and appointed counsel to aid him in his yet unfired habeas corpus petition, in accordance with *McFarland v. Scott*, __ U.S. __, 114 S. Ct. 2568 (1994). *See* 28 U.S.C. § 2251, 21 U.S.C. § 848(q). Smith in due course filed his petition, and this court's evidentiary hearing followed.

Appendix B

II.

Smith first contends that his court appointed attorney at his murder trial in 1983 was ineffective, in violation of the Sixth Amendment to the United States Constitution. The constitutional provision in issue states in relevant part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This amendment is applicable to state proceedings through incorporation into the due process clause of the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

In any ineffective assistance of counsel claim, the court must determine "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the Supreme Court's two-part test in *Strickland*, Smith must first show that his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. The reviewing court must be highly deferential in its scrutiny of counsel's tactical decisions. *Id.* at 689. Every effort must be made to avoid the distortions of hindsight and "to evaluate the conduct from counsel's perspective at the time." *Id.* Further, there is a strong presumption that counsel's conduct was reasonable. *Id.*

In addition to Smith's burden of establishing that his attorney's conduct was not objectively reasonable, he must demonstrate prejudice. *Id.* at 692. To do so, Smith "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This standard requires more than a showing "that the errors had some conceivable effect on the

outcome of the proceeding." *Id.* at 693. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Smith particularly focuses his argument of ineffective assistance of counsel on the penalty phase of his trial. Under Pennsylvania law then and now, after a jury convicts a defendant of a capital offense, it must consider and decide on the penalty to be imposed, that is, whether the sentence will be life imprisonment or death. *See* 42 Pa. Cons. Stat. Ann. § 9711.

In making its decision, the jury must determine whether certain aggravating or mitigating circumstances exist[2] and must weigh and balance any such factors it finds. The statute, 42 Pa. Cons. Stat. Ann. § 9711(c)(1), provides:

> (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

The statute enumerates 16 aggravating circumstances. *See* 42 Pa. Cons. Stat. Ann. § 9711(d). Two of them are: "the defendant committed a killing while in the perpetration of a felony" and "the defendant has a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa.

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2. Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence. *See* 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii).

Cons. Stat. Ann. § 9711(d)(6), (9). The statute also enumerates a number of mitigating circumstances, including "the age of the defendant at the time of the crime." 42 Pa. Cons. Stat. Ann. § 9711(e)(4). The list concludes with an open-ended provision "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. Cons. Stat. Ann. § 9711(e)(8).[3]

The jury in this case found two aggravating factors, to which Smith's trial counsel stipulated: (1) the murder was committed during the perpetration of a felony; and (2) Smith had been convicted of two prior aggravated assaults, which constitutes "a significant history of felony conviction involving the use or threat of violence to the person." See Trial Transcript, vol. 4, p. 421; 42 Pa. Con. Stat. Ann. § 9711(d)(6), (9). The jury found no mitigating factors.[4] Based on this finding of at least one aggravating factor and no mitigating factors, the jury sentenced Smith to death. *See* 42 Pa. Cons. Stat. Ann. § 9711(c)(iv).

A.

Smith asserts that during the penalty phase, defense counsel

3. Pennsylvania's earlier death penalty statute was declared unconstitutional largely because it too narrowly limited the mitigating circumstances which the jury could consider. *Commonwealth v. Moody*, 382 A.2d 442 (1977), *cert. denied*, 438 U.S. 914 (1978). The current version of the Pennsylvania death penalty statute, enacted in 1978, broadly expanded the type of evidence which could be considered a mitigating factor. *See e.g.* 42 Pa. Cons. Stat. Ann. § 9711(e)(8).

4. The jury verdict slip read as follows: "We the jury unanimously sentence the defendant to death. We the jury have unanimously found at least one aggravating circumstance and no mitigating circumstance . . . ." *See* Trial Transcript, vol. 4, p. 432.

was ineffective in failing to offer in mitigation any psychological testimony. Smith maintains such evidence would have shown that he suffers from brain damage.

This court heard extensive testimony at the habeas corpus hearing from Dr. Patricia Fleming and Dr. Carol Armstrong,[5] two highly qualified psychologists called by Smith to discuss his brain function. Both psychologists conducted an examination of Smith. Dr. Armstrong engaged in one day of interviewing and psychological testing of Smith, interviewed family members regarding his background, and reviewed affidavits and psychological reports submitted to this court. Dr. Fleming interviewed and tested him for one and one half days, studied background information about him, and examined psychological reports by Dr. Armstrong and by Dr. Strochak, a psychologist who testified at the state post conviction hearing in 1991.

Both Dr. Armstrong and Dr. Fleming concluded that Smith has brain damage which affects his reasoning capacity. They further testified that his condition was caused by two childhood head injuries. No contemporaneous medical or hospital records or other documentation of these injuries exists. Yet, according to the statements of Smith and family members, when he was about 11 years old, he was hit by a car resulting in trauma to the head. Approximately two years later, he fell down several steps at school, also hitting his head. He claims to have been afflicted with severe headaches after both incidents. In addition, family

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5. Dr. Patricia Fleming holds a doctorate in education and is a licensed psychologist in Cheyenne, Wyoming. Dr. Carol Armstrong holds a doctorate in psychology and is an assistant professor of neurology at the University of Pennsylvania Medical School, an assistant professor in the Drexel University Graduate Neuropsychology Program, and Director of Neuropsychology at the University of Pennsylvania Medical Center.

members recalled that his mental capacity decreased significantly following the accidents.

The tests performed by Dr. Armstrong and Dr. Fleming were consistent in showing that Smith is of "low average" intelligence and has brain damage associated with impairment of the frontal lobe. Dr. Armstrong found severe deficits in "selective attention, logical reasoning, verbal fluency, and in several areas of visuospatial processing and memory." Both psychologists determined that this frontal lobe dysfunction impaired Smith's ability to make reasoned decisions, to control his behavior, and to function adequately in complex situations. The psychological testimony also established that he has experienced the effects of brain damage throughout his adult life.

Smith does not argue that his brain impairment in any way affected his mental capacity to commit murder of the first degree. Rather, Smith maintains that such testimony regarding his brain impairment would have presented the jury with a significant mitigating circumstance at the penalty phase of his 1983 trial. We must therefore determine whether such an omission constitutes ineffective assistance of counsel under *Strickland*.

It is undisputed that Smith's trial counsel did not introduce any psychological evidence at either the guilt or the sentencing phase of his trial. Nonetheless, he did obtain the services of Dr. Robert Sadoff, a highly regarded forensic psychiatrist, to examine Smith prior to trial. During cross-examination of trial counsel at the habeas corpus hearing, he and Mr. Rubenstein,[6] the Bucks County district attorney, engaged in the following exchange:

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6. Mr. Rubenstein was also the prosecutor at the original trial in 1983.

Q: With specific reference to Dr. Sadoff, why is it that you chose to engage Dr. Sadoff as opposed to say another psychiatrist?

A: Because I think he is the best.

Q: And what leads you to that conclusion?

A: He wrote the book, Forensic Psychiatry.

Q: He literally wrote the book?

A: Yes. I think he is generally considered to be the best in the area. If you can get him, he is the person to get.

Q: His reputation among the members of the bar of Bucks County and the persons with whom you interact on a professional basis in other counties, would it be a fair characterization to say that he [is] viewed in the same manner as among the best forensic psychiatrists?

A: Yes.

(N.T., 12/6/95, p. 146-47).

Smith contends that trial counsel was ineffective because he allegedly failed to request that Dr. Sadoff administer psychological tests or evaluate Smith specifically for mitigating factors at the penalty phase. In support of this claim, Smith submitted to the court an affidavit from Dr. Sadoff, in which he states, some 12 years after the fact, that trial counsel asked him

to examine Smith only for competency and not for any penalty phase issues.

Trial counsel acknowledges that he did not ask Dr. Sadoff specifically to perform psychological testing on Smith. However, counsel testified that he asked Dr. Sadoff to provide him with any information which might be helpful in a capital case. On direct examination regarding his consultation with Dr. Sadoff, counsel stated:

> Dr. Sadoff is a very experienced forensic psychiatrist. He was fully aware that this was a first degree murder death penalty case.
>
> I am sure that I talked to him about the case before he came up. I talked to him when he got there before he and Clifford spoke.
>
> And I believe that he understood — he, Sadoff — understood that I was looking for any help that I could get through any aspect of the trial, including the penalty phase.

(N.T. 12/6/95, p. 81). Counsel reiterated his testimony on cross-examination by Mr. Rubenstein:

> Q: Do you recall what it is that Dr. Sadoff told you with regard to your client, Clifford Smith?
>
> A: Basically, that he couldn't find anything that would be helpful.
>
> Q: . . . did he indicate to you that Clifford Smith was, as defined by the *McNaughton* case, insane?

A: He indicated to me that [Smith] was competent. He indicated to me that [Smith] was not insane to the best of . . . [Dr. Sadoff's] opinion, and that he could not find anything that he felt would be helpful to me in any aspect of the case.

Q: Dr. Sadoff knew from you that this was a potential capital case, is that correct?

A: Yes.

Q: And Dr. Sadoff was aware, I assume, that some of the factors in a particular case, especially a capital case, would be whether or not there's any mitigating evidence psychiatrically which could be introduced, correct?

A: I am sure that he was.

(N.T. 12/6/95, p. 149). The court saw and heard trial counsel and credits his testimony to the extent it differs from the affidavit of Dr. Sadoff.

Furthermore, there were no other indicators which might have led trial counsel to seek psychological testing. Counsel spent a considerable amount of time with Smith while preparing for trial.[7] Counsel had ample opportunity to observe his speech, demeanor, ability to reason and make decisions, and capacity to understand his circumstances. Counsel testified that Smith

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7. At the hearing, counsel estimated that he met with Clifford Smith at least once a week from June through November, 1983. (N.T., 12/6/95, p. 152).

was responsive, articulate, and cooperative throughout his representation. (*See* N.T., 12/6/95, p. 105). Smith was not moody, nervous or distant. *Id.*

Family members testified for the first time at the hearing before this court, some 12 years after his murder trial, that Smith experienced two head injuries as a child. It is undisputed that Smith never informed his trial counsel of any childhood head injury. Neither Smith's mother nor his sister, whom counsel interviewed at the time of the 1983 trial, ever mentioned any head injuries or suggested that Smith had any mental deficiencies which caused him to behave impulsively or violently. In fact, even at Smith's state post conviction hearing in 1986, no evidence of such injuries or problems was revealed. Although Smith has a small scar on his upper forehead, it is only visible if pointed out to the viewer at close range. Counsel testified that he never noticed the scar, and there was no evidence presented that it was any more apparent in 1983. Counsel was certainly aware that, in conducting a criminal defense, psychological testing is sometimes warranted. (*See* N.T., 12/6/95, p. 83). In this case, counsel found nothing in his observation of Smith indicating that such a line of defense was applicable.

Smith insists that it was the affirmative duty of an effective counsel, at least in a capital case, to ask Smith and his family members specifically about head injuries. The court declines to find that such inquiries, while perhaps prudent, are constitutionally required. Counsel did employ an experienced and highly regarded forensic psychiatrist, who did not recommend psychological tests. The client, his mother, and his sister never said a word during interviews about any head injuries or any mental or psychological problems. Counsel, in his

extensive conversations with Smith, noticed nothing unusual. Under the circumstances, the Sixth Amendment does not impose a duty on counsel to explore further his client's mental or psychological capacity. *See Clanton v. Bair*, 826 F.2d 1354, 1358 (4th Cir. 1987), *cert. denied*, 484 U.S. 1036 (1988); *see also United States ex rel. Rivera v. Franzen*, 794 F.2d 314 (7th Cir.), *cert. denied*, 479 U.S. 991 (1986). Based on this record, Smith has not established that counsel's failure to present psychological evidence in mitigation was below the objective standard of reasonableness under the first prong of *Strickland*.

In any event, Smith has not proven that counsel's performance, even if objectively unreasonable, satisfies the second prong of *Strickland*. We simply cannot say there is a reasonable probability that the outcome would have been different if counsel had introduced psychological testimony. To reach this decision, we examined not only the potential benefits, but the adverse consequences of calling psychologists like Dr. Fleming or Dr. Armstrong to testify.

At the federal habeas corpus hearing, the cross-examination of Dr. Fleming fairly reflects what would have occurred if Smith's trial counsel had called psychologists as witnesses in 1983:

> Q: Dr. Fleming, as a part of your interview with the petitioner, Clifford Smith, did he relate to you that during the time prior to the murder of Richard Sharp, he . . . was a member of a gang in West Philadelphia?
>
> . . .
>
> A: Yes, he did.

Appendix B

. . .

Q: Did he tell you that in 1979 he had shot another man over an issue of drugs and money?

A: Yes, he did.

Q: Did he tell you that three years later in 1982 he again shot another man over the same issues drugs and money?

A: Yes, he did.

. . .

Q: And did he tell you that in the same year following that second shooting there was a third shooting except that this time he, Clifford Smith, had been shot, did he tell you that?

A: Yes, he did.

Q: So you were aware when you took the history from Mr. Smith that there had been three shootings, two of which he had been the perpetrator and one he had been the victim, is that correct?

A: That's correct.

Q: Did he also tell you that in Philadelphia shortly thereafter he had been arrested, tried and convicted on charges of carrying a firearm without a license?

. . .

A: I can't recall.

(N.T., 12/5/96, pp. 86-88).

It is clear that Mr. Rubenstein would have pursued this line of questioning with any psychologist or psychiatrist presented by Smith at his murder trial. (*See* N.T., 12/6/95, p. 177). The trial judge would undoubtedly have allowed such questioning because a witness may be cross-examined regarding facts upon which he or she relied in forming an opinion. While the jury knew at the penalty phase that Smith had been convicted of two prior aggravated assaults, they did not hear the grisly details of Smith's prior criminal actions, particularly that he had shot two other people in fights over drugs and money. Such graphic information is likely only to have strengthened the possibility that the jury would impose the death penalty. Moreover, the jury was not aware that Smith had been a gang member. Eliciting this fact would not have helped Smith.

The court finds that the evidence that Smith suffered the effects of brain damage is not such compelling mitigation that it would have outweighed the concrete aggravating factors, especially given the even more damaging information which would have been revealed through cross-examination. There is not a "reasonable probability" that but for counsel's failure to present this testimony, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Both psychologists conceded that Smith's brain damage had no effect on his ability to commit first degree murder. The court's "confidence in the outcome" of this case has not been undermined by the failure to produce psychological testimony at the penalty hearing in 1983. *See Strickland* at 694.

Appendix B

B.

Smith next argues that his trial counsel was ineffective for failing to conduct a full investigation of Smith's "background" which would have uncovered extensive mitigating circumstances for use at the penalty phase of the trial.

During the course of the trial, counsel interviewed Smith's mother and one of his sisters. At the penalty phase, trial counsel called Smith's mother, Carrie Smith, as the only witness. He asked her 14 questions, which covered Smith's childhood, his siblings, his parent's separation, and problems with gangs in the neighborhood. Mrs. Smith testified that when Smith was younger, it was difficult for him to get to school because of the gangs. Smith's sister did not testify.

We have no transcript of the summation of trial counsel to the jury at the close of the penalty phase.[8] In any event, at both the state post-conviction hearing and this federal proceeding, counsel testified as to the essence of his argument. He explained:

> I wanted [the jury] to consider that he was a young person, hopefully having done something in a rash moment, and that he was the product of the ghetto in Philadelphia, and that his family was broken and they should . . . cut him a break.

(N.T., 12/6/95, p. 22). Counsel recalled that he argued two mitigating factors to the jury. First, he emphasized Smith's youth,

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8. At the time of Smith's trial, it was not the practice of the Bucks County Court of Common Pleas to record or transcribe the summations of counsel. In this case, the Assistant District Attorney Alan Rubenstein happened to have made a separate arrangement to have his summation recorded. Oral Argument, 12/18/95, tape 3, counter # 4840-4920.

which is specified as a mitigating factor under the Pennsylvania statute. 42 Pa. Cons. Stat. Ann. § 9711(e)(4). Smith was 23 years old at the time of the trial. Second, he argued Smith's disadvantaged background, which falls under the catch-all provision, allowing "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. Cons. Stat. Ann. § 9711(e)(8).

Smith maintains that the evidence counsel presented was extremely limited and the closing argument unpersuasive. At the habeas corpus hearing, Smith produced six witnesses who offered evidence in mitigation regarding Smith's background and character.[9] Each witness stated that he or she would have been willing to testify at the penalty phase on Smith's behalf in 1983, but that trial counsel never contacted him or her to do so. According to Smith, each would have provided strong evidence of mitigation and would likely have swayed at least one juror to vote for life instead of the death penalty. Smith maintains it was therefore ineffective for trial counsel not to have discovered these witnesses and to have presented their testimony.

The testimony of Smith's sister, Donna Smith, is typical of the evidence offered by family and friends at the habeas corpus hearing. According to Ms. Smith, when Clifford Smith was a child, he was a "good kid" and he did not get into fights. He looked after her as a big brother. He did his homework and helped his sister with hers. She stated that he attended church every Sunday. He was an usher and was involved in church activities. As a child, Smith was helpful to people in the neighborhood. He would run errands for elderly folks, such as going to the

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9. The following witnesses testified: Jacqueline Sullivan and Donna Smith, petitioner's sisters; Valerie Brown, a neighbor and friend; Alfoster Spears, an uncle; Cassie Ford, a great-aunt; and Frances Holcomb, the grandmother of petitioner's two children.

grocery store for them. (*See* N.T., 12/5/95, pp. 148-53). When Smith was approximately 11 years old, his parents started to have problems, and his father subsequently left the family.[10] The father's abandonment devastated him, and left him confused, angry and hurt. Smith's mother worked much more after the separation and was not at home as often. He had to take on responsibilities as the "man of the house." Donna Smith noted that when her brother was young, he worked for his uncle and did odd jobs around the neighborhood to make money to help out the family. Smith also suffered from ulcers as a result of stress about his parent's divorce. (N.T., 12/5/95, pp. 150-57). Donna Smith further stated that he changed after his two childhood head injuries. He would be irritable, confused, and anxious, and unable to handle stress. No witness testified, however, that the injuries had any effect on Smith's ability to carry out his normal routine. (N.T., 12/5/95, pp. 153-57).

Finally, there was evidence that Smith had an ongoing relationship with Frances Atkins, the mother of Smith's two children.[11] Donna Smith professed that he was a good and loving

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10. There is a significant discrepancy between the testimony of petitioner's two sisters, Jacqueline Sullivan and Donna Smith, as to the nature of the problems in the Smith home prior to the father leaving. Jacqueline Sullivan testified that there was "domestic abuse" in the household by the father. (N.T., 12/4/95, p. 165). She stated that the father had a drinking problem, that he hit the mother, and that he also struck Clifford. Donna Smith, on the other hand, testified that her father was a working man, that he drank on occasion, but was never violent toward the children, including Clifford. She described one incident where the father struck the mother during a fight, but did not relate any pattern of physical violence. (N.T., 12/5/95, p. 163).

11. At the time of the trial in 1983, one child was 3 years old and the other child was an infant.

father and that he provided for the children and Frances Atkins. She also stated that her brother loved his mother and was a good son to her. (N.T., 12/5/95, pp. 131-32).

It is undisputed that counsel did not interview any of the above named witnesses, except for one of the sisters, and, as noted above, did not present any testimony at the penalty phase except that of Smith's mother. Trial counsel was concerned that such testimony was essentially character evidence, which would have "opened the door" to devastating cross-examination by Mr. Rubenstein. Had this testimony been presented, trial counsel was fearful that the Commonwealth would have been permitted to question the witnesses about their knowledge of Smith's gang activities, the unsavory details of his criminal record, his use of an alias, and inculpatory statements Smith made to some family members about the murder of the pharmacist, Richard Sharp. Counsel was particularly worried about the possibility of the jury hearing that Smith had previously shot two men in separate incidents over drugs and money. In fact, counsel considered it lucky that the evidence admitted at the penalty phase about Smith's criminal record was limited to two aggravated assaults, when his rap sheet was far worse. (N.T., 12/6/95, pp. 42, 161).

Under Pennsylvania law, Smith was entitled to offer evidence of his good character to establish mitigating circumstances at the penalty phase. *See* 42 Pa. Cons. Stat. Ann. § 9711(e). Once character witnesses testify, however, they are subject to cross-examination about specific bad acts in Smith's history. It is well settled in Pennsylvania that

> [a]lthough evidence of good character may not be rebutted by evidence of specific acts of misconduct, a character witness may be cross-examined regarding

> his knowledge of particular acts of misconduct by the defendant to test the accuracy of his testimony and the standard by which he measures reputation.

Commonwealth v. Peterkin, 513 A.2d 373, 382-83 (Pa. 1986), *cert. denied*, 479 U.S. 1070 (1987). Although *Peterkin* post-dates Smith's trial, this was clearly the law at that time. *See Commonwealth v. Jones*, 19 A.2d 389, 393-94 (Pa. 1941).

Certain evidence which Smith contents should have been presented at his penalty hearing clearly would have put his character in issue. Such evidence included testimony that Smith was a "good kid" and a loving son, that as a child he helped elderly neighbors with groceries and was an usher at church, that he worked extra jobs to made money for the family, and that he adored his children and provided for them and their mother. Witnesses who would have testified to this effect would have been subject to cross-examination about specific bad acts in accordance with the rule of law enunciated in *Peterkin*. Moreover, if defense counsel put on evidence that Smith was a good family man, certainly the prosecutor would have been entitled to remind the jury that Smith committed the crime in issue with the help of his paramour, Yvette Barrow, whom he met at a bar two weeks before the murder. *See* Trial Transcript, vol. 4, p. 194.

Counsel testified that he had strong misgivings even about calling Smith's mother to the stand, but believed it was necessary so that he could argue mitigation to the jury based on facts in the record. He was concerned that Mrs. Smith would say something about her son which would have opened the door to harmful cross-examination from Mr. Rubenstein. Trial counsel was worried, for example, that Mrs. Smith might say that Smith

had never been in trouble before, or that he was a good kid. In any event, counsel felt compelled to call Mrs. Smith, but believed that if he examined her only briefly, Mr. Rubenstein would not seek to bring out some of the infamous events in Smith's life. Trial counsel proved to be correct, since Mr. Rubenstein asked her no questions. (*See* N.T., 12/6/95, pp. 137-39).

Smith contends, however, that counsel's representation falls below an objective standard of reasonableness because his decision not to present further testimony was based on a misunderstanding of the law of evidence. Smith argues that much of the evidence would not have "opened the door" to damaging cross-examination because it was merely "background evidence," not character evidence.

Mere background testimony, we concede, does not put a person's character in issue.[12] *See United States v. Gillespie*, 852 F.2d 475, 479-80 (9th Cir. 1988). We further agree that some testimony the court heard can be characterized as "background." For example, the fact that Smith was poor, he came from a broken home, his father's abandonment of the family devastated him, and he had head injuries as a child, is not, in and of itself,

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12. In *Commonwealth v. Peterkin*, 649 A.2d 121, 127 (Pa. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 2569 (1995), the Supreme Court of Pennsylvania stated that ". . . both character and background evidence are subject to rebuttal with evidence of prior bad acts . . . ." In that case, however, the evidence which petitioner called "background" was clearly character evidence. Petitioner claimed he would have offered seven witnesses, mostly family members, to testify to his "excellent reputation in the community for being a peaceful, non-violent individual." *Id.* at 126. Therefore, we do not believe that *Peterkin* holds that "background" evidence and character evidence are synonymous. However, if they are the same under Pennsylvania law, trial counsel's reason for not producing such evidence is even more compelling.

evidence of character. The witnesses at the habeas corpus hearing, it must be emphasized, did not limit their statements to such information. Trial counsel rightly feared that the testimony of unsophisticated and partisan witnesses could easily spill over into an area which would subject them to cross-examination about defendant's bad acts. In any event, Smith's mother did testify about Smith's disadvantaged background during the penalty phase of the trial. *See* Trial Transcript, vol. 4, pp. 422-24. Thus, the jury had this mitigating evidence before it.

Smith relies on *Commonwealth v. Basemore*, 582 A.2d 861 (Pa. 1990), *cert. denied*, 502 U.S. 1102 (1992), for the proposition that he should be permitted to introduce "evidence of mitigation concerning the character and record of the defendant . . . ." without fear of cross-examination. *See* 42 Pa. Cons. Stat. Ann. § 9711(e)(8). This contention is without merit. The majority opinion in *Basemore* does not address this statutory provision. It deals only with mitigating circumstances under 42 Pa. Cons. Stat. Ann. § 9711(e)(1). The case simply holds that evidence of a single prior criminal conviction is admissible to rebut the mitigating circumstance set forth in § 9711(e)(1) that defendant does not have a significant history of prior criminal convictions. While Justice Cappy supports Smith's contention in his concurring opinion, this view is clearly dicta. No other justice joined in his opinion. Smith was entitled to put on evidence which may have made him seem more sympathetic, but he risked the consequences of such a tactic. *Basemore* does not hold otherwise.

It is clear from counsel's testimony at the federal habeas corpus hearing that he made a strategic decision to limit the testimony at the penalty phase to that of Smith's mother. (*See* N.T., 12/6/95, pp. 41, 137, 160-61). He stated specifically, "I

had a definite tactical problem, strategic problem with who I was going to present at the sentencing hearing because of his prior record. *Id.* at 41. The Supreme Court has held that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland* at 690-91. The question, then, is whether counsel's strategy was an objectively reasonable one under *Strickland.*

In other cases, counsel put on limited or no mitigating testimony from family members, yet the Supreme Court did not find ineffective assistance of counsel. *See e.g. Burger v. Kemp,* 483 U.S. 776 (1987); *Darden v. Wainwright,* 477 U.S. 168 (1986). In *Darden,* the Supreme Court held that a defendant had effective assistance at sentencing, despite his claim that counsel spent only the one-half hour between the close of the guilt phase and the start of the penalty phase to prepare. This contention was found to be without merit because counsel's extensive trial preparation included preparing for sentencing. There, counsel chose to rely on a simple plea of mercy from the defendant himself. The Court held this was a reasonable tactical decision because other possible strategies could have opened the door for the state's presentation of damaging rebuttal evidence. The Sixth Amendment does not require counsel to present testimony from family members when there exist strong countervailing reasons to exclude it. In the case at bar, counsel's performance falls well within the range of acceptable legal representation. As in *Darden,* counsel's options were extremely limited, and he acted accordingly. Smith has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 466 U.S. at 689, (quoting *Michel v. Louisiana,* 350 U.S. 91, 101 (1955)). We do not have before us counsel's closing argument. Perhaps it could have been longer, more artful, or more passionate. But

Smith has not proven that counsel's representation fell below the objective standard of reasonableness under the first prong of *Strickland* by the failure to present "background" or character evidence in mitigation.

In the alternative, Smith maintains that counsel should have presented evidence in mitigation despite the risk of cross-examination. We concede that Smith's predicament at the penalty phase could not have been much worse. The jury had before it stipulations for two aggravating factors. It was critical, therefore, for the jury to find mitigation to avoid a sentence of death. *See* 42 Pa. Cons. Stat. Ann. § 9711(c)(1). If counsel had not attempted to establish any mitigating factors, his omission would probably constitute ineffective assistance. But this was not the case here. Based on Smith's mother's testimony at the penalty phase, counsel argued two mitigating factors to the jury. First, he emphasized Smiths youth and inexperience. *See* 42 Pa. Cons. Stat. Ann. § 9711(e)(4). Second, he argued Smith's broken home and disadvantaged background as evidence of mitigation. *See* 42 Pa. Cons. Stat. Ann. § 9711(e)(8).

In any event, the court finds there is no prejudice to Smith under the second prong of *Strickland* by counsel's failure to introduce evidence from the family members who testified at the habeas corpus hearing. Much of the evidence in mitigation would have been more harmful that helpful. Even if all the information this court heard could have been admitted without fear of rebuttal, there still would be no prejudice under *Strickland*. The additional evidence beyond what his mother said would not have been particularly compelling under all the circumstances. As with the psychological evidence, there is not a "reasonable probability" that but for counsel's failure to present this testimony, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Appendix B

III.

Smith also contends that the prosecutor's closing argument at the penalty phase of the trial was constitutionally flawed. He argues that the prosecutor violated his right under the Eighth Amendment against "cruel and unusual punishment" as incorporated into the due process clause of the Fourteenth Amendment.[13] In addition, he maintains that the failure of defense counsel to object violated his Sixth Amendment right to the effective assistance of counsel.

In his summation, the Assistant District Attorney stated:

> [Defense counsel] has raised the issue that the defendant, no matter what, will not walk out of this courtroom, and he says to you that he will be executed if death is your verdict. Since he brought up that point, I can advise you of something. No one knows for sure. We don't know if that eventually will occur. Someday — and it won't be tomorrow, no matter what your decision is, and it will be years from now — but, someday conceivably people sitting in Harrisburg, who didn't sit here, could look at a bunch of papers and say "We'll let him out; he's done enough time; it's time for parole." That could happen too.

The antecedent argument of defense counsel, as noted above,

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13. The Eighth Amendment provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Its proscription against cruel and unusual punishment is applicable to the states through the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962); *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).

was not transcribed.[14] However, at the post conviction hearing in the state court in 1991, defense counsel testified that in his summation he had told the jury that if sentenced to life imprisonment Smith would "spend the rest of his life behind bars" and that "he would never get out of prison" (N.T., 12/10/91 at 124).

In asserting that the prosector's argument was constitutionally tainted, Smith relies heavily on the decision of the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In that case, Caldwell had been convicted of murder by a jury in a Mississippi state court. During his closing argument at the penalty phase, the defense attorney, quoting the Bible, appealed to the members of the jury to have mercy on the defendant as they undertook their "awesome responsibility." The prosecutor then responded in part as follows:

> I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know — they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

After defense objection, the court stated:

> Alright, go on and make the full expression so the jury will not be confused. *I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands* I think that information is now needed by the jury so they will not be confused.

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14. *See* footnote 8, *supra.*

[Emphasis added]. The District Attorney continued:

> Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. *For they know as I know and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically*, and I think it's unfair and I don't mind telling them so.

[Emphasis added]. *Caldwell*, 472 U.S. at 325-26.

The Court held that the prosecutor violated defendant's Eighth Amendment rights because "the sentencing jury [was] led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Id.* at 323. The Court emphasized that appellate review has significant limitations which were not explained to the jury. The keystone of the Court's decision is the principle that the jury must understand that the imposition of the death penalty is in its hands. Its role cannot be minimized by telling it incorrectly that ultimate responsibility is lodged in another place. As the Court explained:

> . . . we conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Id. at 328-29. If a jury is misled, there is grave danger that it will not take its responsibilities seriously. It may, without proper deliberation, sentence a person to die in the mistaken belief that its decision is not critical because some other body will make the final decision.

In *California v. Ramos*, 463 U.S. 992 (1983), the defendant challenged his death sentence. He claimed that his Eighth and Fourteenth Amendment rights were violated when the state trial judge instructed the jury at the penalty hearing that the Governor had the power to pardon or commute a sentence. The judge specifically charged that the Governor "may . . . commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole." *Ramos*, 463 U.S. at 995-96. In denying defendant's challenge, the Supreme Court observed that the instruction was an accurate statement of California law. The Supreme Court held that no federal constitutional impediment exists to providing the jury "with an accurate statement of a potential sentencing alternative." *Id.* at 1009.

Reading *Ramos* and *Caldwell* together, it is constitutionally impermissible for either a prosecutor or a court to mislead a jury about its responsibility for determining whether a person should be executed by giving it inaccurate information about its role in the process or about the role of an appellate court, the Governor, or a parole or pardons board. So long as what the jury is told is complete and accurate, the Eighth Amendment is not implicated.

With this backdrop, we turn to the case at hand. In responding to defense counsel's argument that Smith "will be executed if death is your verdict," the prosecutor told the jury

"[n]o one knows for sure. We don't know if that eventually will occur." He continued:

> Someday — and it won't be tomorrow, no matter what your decision is, and it will be years from now — but, someday conceivably people sitting in Harrisburg, who didn't sit here, could look at a bunch of papers and say "We'll let him out; he's done enough time; it's time for parole." That could happen too.

The prosecutor in effect told the jury that even if it fixed the penalty at death, nameless officials in the state capital had the power to override that decision and release Smith on parole. The prosecutor's summation was inaccurate, as he candidly conceded at this court's post hearing argument on the pending petition. *See* Oral Argument, 12/18/95, tape 4, counter # 1470-1520. Under Pennsylvania law, a person convicted of first degree murder, as Smith had been, was not and is not eligible for parole. *See* 18 Pa. Cons. Stat. Ann. § 1102; 42 Pa. Cons. Stat. Ann. § 9711, 9756; *Commonwealth v. Yount*, 615 A.2d 1316, 1320 (Pa. Super 1992), *appeal denied*, 631 A.2d 1007 (Pa. 1993). The only way a death sentence can be commuted in the Commonwealth is by the Governor on recommendation of a majority of the Board of Pardons.[15] The prosecutor's remarks diminished the responsibility of the jury in a way prohibited under *Caldwell* and *Ramos*.

The prosecutor's remarks about parole were especially

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15. *See* Pa. Const., Art. IV, § 9. The Board of Pardons consists of the Lieutenant Governor as chair, the Attorney General, and three other members appointed by the Governor with the consent of the State Senate. One of these three must be a penologist, one a medical doctor, a psychiatrist or psychologist, and one an attorney. 71 Pa. Cons. Stat. Ann. § 113.

misleading in another respect prohibited by *Ramos*. As the courts have recognized, parole for criminals sentenced to prison was a fixture of our penal system at least up until a few years ago. *See Simmons v. South Carolina*, __ U.S. __, 114 S. Ct. 2187, 2197 (1994). While parole has been limited and replaced by fixed terms of incarceration in many instances, there is still a widely held perception that inmates are released from prison before their terms expire. *See id.* at 2191, 2197; Paduano & Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Human Rights L.Rev. 211, 222-25 (1987). If anything, this perception was more extensively held in 1983 at the time of Smith's trial for murder. Thus, the prosecutor falsely impressed upon the jury that a life sentence would not really be a life sentence for Smith who had committed a vicious murder and had two prior aggravated assault convictions by the time he was 23 years old. The prosecutor's statement was a not so subtle effort to warn the jury that if it decided on life imprisonment, Smith could be out on the street again to prey on innocent victims. *See Simmons*, *supra*, (Plurality opinion of Blackmun, J.).

The Commonwealth argues that any error which stemmed from the prosecutor's remarks regarding the weight of responsibility on the jury was corrected in the trial judge's charge:

> Now the verdict is your verdict . . . . Remember, because counsel have both said this to you and I feel it is so important that I should repeat it, that you are not merely recommending a punishment. The verdict you return will actually fix the punishment for the crime of murder in the first degree at death or imprisonment.

Trial Transcript, vol. 4, pp. 428-29. We find that this charge, without more, does not neutralize the misleading comment by the prosecutor which gave the clear impression to the jury that "people sitting in Harrisburg," even years in the future, could overturn the decision of the jury. The trial court never told the jury that Smith could not be released on parole. The judge did not tell the jury that the prosecutor's statement was wrong. Instead, without reference to the serious inaccuracy, the court simply pointed to a part of the closing arguments where counsel apparently stated that the jury was "not merely recommending a punishment," but was determining it. In this case, the Commonwealth minimized the jury's sense of responsibility for determining the appropriateness of death. The trial court did not correct the error.

In sum, the jury was left with the critical misunderstanding that if it sentenced Smith to life he might be released on parole so as to pose a future danger to society. The prosecutor's summation, as noted, also left the jury with the inaccurate misconception that it did not have the ultimate responsibility for a death penalty decision because unidentified bureaucrats on the parole board might override any death penalty decision. Both were improper goads for a death sentence. Together, these statements undermined the jury's deliberative process and unconstitutionally tainted the jury's death sentence. Because this court cannot say that the prosecutor's comments "had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." *Caldwell*, 472 U.S. at 341.

Mr. Rubenstein makes the argument that his closing statements fell under the "fair comment" doctrine which is recognized under Pennsylvania law. *See Commonwealth v.*

Clayton, 532 A.2d 385, 395 (Pa. 1987), *cert. denied*, 485 U.S. 929 (1988). Under this doctrine, a prosecutor may be permitted to make an otherwise inappropriate statement in order to prevent the jury from being misled by defense counsel's improper statements. *Id.* at 397. However, "fair comment," even if invited by defense counsel's improper remarks, must nonetheless be accurate. *See California v. Ramos*, 463 U.S. 992 (1983). In this case, it was not, as the prosecutor has readily acknowledged.

It follows from the above analysis that trial counsel's failure to object to the prosecutor's summation violated Smith's right to effective assistance of counsel under the Sixth Amendment. Trial counsel stated at the federal habeas corpus hearing that "I do not ever recall him [Mr. Rubenstein] using the word parole, because I am sure if I heard the word parole, I would have either objected or I would have asked the Judge for an instruction that . . . there is no parole from a life sentence." (N.T., 12/5/95, pp. 116-17). However, the transcript reflects no record of trial counsel having done so. Trial counsel's failure to object to the inaccurate and misleading statements by the prosecutor falls below the objective standard of reasonableness set forth under the first prong of *Strickland*.

In such a case, prejudice stems automatically from counsel's actions, satisfying the second prong of *Strickland*. The court finds that but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different and that at least one juror would have voted for life instead of the death penalty. The Commonwealth claims that because the jury found two aggravating factors and no mitigating factors, the prosecutor's comments could not have affected the result of the jury's decision. This contention lacks merit. If the prosecution had not injected the specter of parole into the sentencing proceedings, there is a reasonable probability

under *Strickland* that the jury would have found mitigating circumstances.

IV.

Smith has raised several other arguments in his petition concerning both the guilt and penalty phases of his 1983 trial. These we find to be without merit.

V.

Accordingly, Clifford Smith's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is conditionally granted with respect to his sentence of death and denied in all other respects. Smith shall be released from confinement within 180 days unless within that period he is resentenced in further proceedings not inconsistent with this opinion. The order of this court will be stayed pending appeal.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 95-3671

CLIFFORD SMITH

v.

MARTIN HORN, et al.

ORDER

AND NOW, this 22nd day of February, 1996, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the petition of Clifford Smith for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is conditionally GRANTED with respect to his sentence of death and DENIED in all other respects;

(2) petitioner Clifford Smith shall be released from confinement within 180 days unless within that period he is resentenced in further proceedings not inconsistent with this court's accompanying Memorandum; and

(3) this Order is stayed pending any appeal.

BY THE COURT:
s/ Harvey Bartle III
J.

APPENDIX C — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-9001 and 96-9002

CLIFFORD SMITH

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; JAMES PRICE, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

District Attorney of Bucks County,

Appellant No. 96-9001

CLIFFORD SMITH,

Appellant No. 96-9002

v.

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; JAMES PRICE, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT, OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

Appendix C

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MC KEE, *Circuit Judges*

The petition for rehearing filed by District Attorney of Bucks County, appellant in No. 96-9001 and appellee in No. 96-9002, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Judge Greenberg and Judge Alito would have granted rehearing en banc.

By the Court,

s/ Robert E. Cowen
Circuit Judge

Dated: AUG 21 1997

LRB/CC: GM
SH
YB